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IN THE

Supreme Court of the United States

NO. 641 [redacted].

WILLIAM D. HALL,

Petitioner,

v.

NATIONAL FARMERS ORGANIZATION, INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, William D. Hall, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on May 31, 1967, and upon which a petition for rehearing was denied on June 26, 1967.

OPINIONS BELOW

The District Court for the Southern District of Indiana, Indianapolis Division, did not write an opinion on its order. The opinion of the Court of Appeals for the Seventh Circuit, from which this writ of review is sought, is not reported. A copy of said opinion is attached hereto as Appendix I and appears at page 1a; a copy of the order denying the petition for a rehearing is attached hereto as Appendix II and appears at page 3a.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was dated and entered on May 31, 1967. The petition for rehearing was filed on June 14, 1967. This petition was denied and entered by the Court on June 26, 1967. The jurisdiction of this Court is invoked under Title 28 U.S.C.A., §§1254(1) and 2101(c).

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

(1) Whether the matters embraced within the pending suit are closely and substantially related to the subject matter included within an area of my previous representation of NFO.

(2) If the answer to Question Number (1) is in the affirmative, then does the rationale of *Consolidated Theaters* vs. *Warner Bros. Circuit Management Corporation*, 2 Cir., 216 F. 2d 920; *Cord* vs. *Smith*, 9 Cir., 338 F. 2d 516; and *T. C. Theatre Corp.* vs. *Warner Bros. Pictures, Inc.*, D.C.S.D. N.Y., 113 F. Supp 265, support the order of the Circuit Court of Appeals, or was I required or permitted to inform the members on matters made

the subject of this action and to represent them in an action for declaratory judgment on behalf of NFO to correct them?

(3) Does the fraud, misrepresentation, and concealment of material facts from the members by management and other illegality appearing in the record create an exception to the attorney-client privilege premitting me, as a former attorney of NFO, to represent the membership in this action for declaratory judgment for and on behalf of NFO?

STATUTES, REGULATIONS, AND FEDERAL RULES INVOLVED

Title 15, U.S.C.A., §13(c):

> "*Payment or acceptance of commission, brokerage or other compensation.*—It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control of any party to such transaction other than the person by whom such compensation is so granted or paid."

Title 28, U.S.C.A., §1254(1):

> "*Courts of appeals—Certiorari—Appeal—Certified questions.*—Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Title 28, U.S.C.A., §1651(a):

"*Writs.*—(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Title 28, U.S.C.A., §2101(c):

"Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceedings before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Chapter 504, Laws of the State of Iowa, §504.8:

"*For agricultural, horticultural, and cemetery purposes.* Corporations organized for agricultural or horticultural purposes, and cemetery associations, shall not own to exceed nine sections of land, and the improvements and necessary personal property for the proper management thereof; and the articles of incorporation shall provide a mode by which any member may at any time withdraw therefrom, and also the mode of determining the amount to be received by such member upon withdrawal, and for the payment thereof to him, subject to the right of creditors of the corporation; and their duration shall be without limit, unless terminated by act of the general assembly."

Chapter 504, Laws of the State of Iowa, §504.10:

"*Dividend.* No dividend or distribution of property among the stockholders shall be made until the dissolution of the corporation."

Article IX of NFO's Articles of Incorporation:

"No dividend or distribution of the property of this corporation shall ever be made among the officers or members of this corporation until dissolved and the private property of the officers and members hereof shall be exempt from the debts and liabilities of this corporation."

Article XI of NFO's Articles of Incorporation:

"Any of these Articles except Article IX, may be amended, changed or repealed at any annual meeting of the corporation, or at any special meeting called for that purpose."

Canon 16 of the Canons of Professional Ethics, as amended, ABA:

"A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Court, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation."

Canon 32 of the Canons of Professional Ethics, as amended, ABA:

"No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a

public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."

Canon 41 of the Canons of Professional Ethics, as amended, ABA:

> "When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps."

STATEMENT

The National Farmers Organization, Incorporated, (hereinafter referred to as "NFO"), was incorporated under Chapter 504 of the laws of the State of Iowa in November, 1955. It is entitled, "Corporations Not For Pecuniary Profit", and it is not one of Iowa's laws governing agricultural cooperatives. The prohibitions in Ar-

ticle IX and Article XI of NFO's Articles of Incorporation are in accord with the prohibitions set out in Section 504.8 and Section 504.10 of the Iowa Code. On November 18, 1958, Article III of NFO's Articles of Incorporation was amended in order to permit it to enter into collective bargaining, on a non-profit basis, for the benefit of its members. Membership agreements were prepared and signed by farmers over the United States which authorized NFO to act as their exclusive agent in collective bargaining. They authorized NFO to sign master contracts with processors for the sale of their commodities and to activate them when 60% of the previous three years' production, either nation-wide or over a sufficient portion of the market so that this percentage is the controlling factor in the market, had been placed under these contracts.

Until master contracts are activated, NFO receives a minimum of $25.00 a year from each member for membership dues. After master contracts are activated, NFO will then receive 1% from each member's gross sales to defray the expenses of running the organization in place of the $25.00 annual dues, plus an additional 2% of each member's gross sales to be used for surplus disposal, at the discretion of the directors.

Under these same contracts, NFO also agrees to act as a procurement agent for the purpose of furnishing these same processors with the various commodities covered thereunder. For acting as said procurement agent for these processors and for performing other services under said contracts, the processors agree to pay direct to NFO from their own funds an amount equal to 5% of the gross sales of the commodity covered under the contract received from NFO members. One-half of 1% of said 5% received from the processors is to be used, as determined

by NFO's national board of directors, to promote the sale of the particular product called for under these contracts, and the disposition of the balance of said 5% is to be determined at a special national convention of the members of NFO, to be held prior to the ratification of the first master contract. [R. pp. 5-21, and attached exhibits] None have been activated to date. Management has led the entire membership to believe they can get this 4.5% because NFO is built on a profit structure under the principle of a free enterprise system. As a result, this 4.5% will always guarantee NFO members a greater profit over non-members for the sale of their production. [R. p. 94, and attached Exhibit Z] They have been told that the processors could not legally pay this 4.5% direct to NFO's members—it had to be paid first to NFO, and then NFO could legally distribute this money to its members. [R. pp. 72-92 (Affidavit of Philip F. Apple, Exhibit P, pp. 159-161)]

In August of 1964, I was employed on an hourly rate, on a case-by-case basis, to defend NFO and its members in many injunction and damage suits that grew out of a meat holding action. This involved about 95% of my efforts. Counsel concedes this activity was not substantially related to the subject matter herein. [p. 30 of Respondent's Brief in Appellate Court] An analysis of the rest of the pertinent parts of the record proves all my other activities were not substantially related to this action either.

I began to suspect there were very serious problems in NFO's structure. However, I had no idea the officials of NFO already knew this but were deliberately withholding vital information from the membership and were keeping it secret. Thinking I was doing our farmers and the general public a great service, I voluntarily on my own

initiative, and without a request, promise of pay, or knowledge of NFO's officials, researched and uncovered all matters made the subject of this action from public documents. Several months later, I was still trying to get management to let me meet with the directors to inform them of what I had uncovered, but all I ever got was promises. Finally, the president and executive committee admitted to me in September of 1965 that they already knew about these problems. They felt this information was secret and confidential and the members did not have a right to know about it. They criticized me severely for uncovering them because they had not employed me to do so. After objecting to paying an additional $1,000.00 I submitted with other fee statements for part of my research time and 173 pages of research material I was giving them, because they did not want to pay to educate me, too, I agreed to deduct the $1,000.00. This was about 1:30 a.m. By this time, however, the office personnel to whom I had given my statements several hours earlier for processing, had gone home. When I returned to NFO headquarters at 8:30 a.m. the same day, they had changed their mind before I had an opportunity to get my statement and deduct the $1,000.00. Therefore, the original amount was paid.

Once aware I was not going to be able to inform the directors of the gigantic fraud that was being perpetrated upon the entire membership and I was convinced the officials were not going to do anything about it, I wanted no part of it. Therefore, I resigned on November 10, 1965. [R. p. 93 (90-91)] My renewed request on November 22, 1965, (R. p. 93 (93)] to meet with the board, free of charge, was again refused by NFO's president on November 24, 1965, [R. p. 93 (94)] who demanded that

I not communicate or contact them, their officers, directors, or members.

On November 19, 1965, I spent about four hours in my office explaining my findings and giving citations to Mr. Lee Sinclair, NFO's chief counsel, who had resigned from the trial staff of the Federal Trade Commission in October, 1965, to represent NFO. Thereafter, Mr. Sinclair told the plaintiff, Keith Dare, and other members at NFO's national convention around December 3, 1965, he agreed with me that these problems existed, and I was right. However, they should not concern themselves any further with these problems; just leave them alone because they would all be corrected within a six months' period of time. He promised to so notify Mr. Dare, but he never did. [R. p. 140 (8-9)] Some of NFO's officials from the national office were also in Indianapolis on November 19, 1965. They admitted to Mr. Dare and other members they had already known about these problems and that I had been trying to meet with the board for a long time, but the president, being the boss, did not think it necessary. They had traveled from Corning, Iowa, at the request of President Staley to try to persuade Mr. Dare and other members to sign affidavits and cooperate with Mr. Staley to bring disbarment proceedings against me for telling Mr. Dare about matters set out in this suit. [R. pp. 72-92 (Affidavit of Keith Dare, Exhibit E, pp. 93-95)]

Later on, the officials held membership meetings for the purpose of telling members everything was alright; that there was nothing to worry about; just leave everything to them. [R. p. (9-10)] On December 29, 1965, Mr. Sinclair wrote me, saying he had advised the officials of NFO the 5% provision in the master contracts did not

violate Section 2(c) of the Robinson-Patman Act and on this one point we did not need to concern ourselves further. [R. p. 93 (139)] While he was a member of the Federal Trade Commission, it issued certain cease and desist orders against certain members of the Fresh Fruits and Vegetables Industry for charging and receiving compensation from the opposite side of the same sales transaction for services rendered. Also, after a four-year study of the entire problem and a public hearing on the proposed rules in Washington, D.C., before the full Commission on October 1, 1964, [R. p. 141], the Federal Trade Commission promulgated certain trade practice rules in April, 1965, to advise them this could not be done because the "services rendered" provision was not an exception to the prohibition set forth in Section 2(c) of the Robinson-Patman Act.

Over the months that followed my resignation, many NFO members continued to inquire about my findings. Some members wrote letters. [R. p. 93 (165-167)] As an attorney, I was caught. If I spoke up, I knew NFO officials would attempt more disbarment proceedings to keep me quiet. If I remained silent, I would be concealing this fraud. If I said anything and it was short of the facts, it would be wilful misrepresentation. I knew that NFO was bound to fail under the present arrangement, regardless of how one argued. Therefore, I asked the Indiana State Bar Association for guidance because the members suspected there were problems and wanted me to file an action for declaratory judgment for and on behalf of NFO, since it could not do so and the officials refused. [R. p. 93 (160-164)] After conferring with the Indianapolis Bar Association, I was advised it would be ethical for me to inform the membership of these problems made the subject of this action and to represent them herein. [R.

p. 72 (167-168)] Otherwise, its counsel thought I would be concealing what I believed to be a fraud upon the organization. [R. p. 93 (176)] Thereupon, I made said disclosures, and several hundred members from several states asked me to prepare and file this suit for them, through the plaintiffs as their representatives. They were only interested in seeing that NFO was made to operate within the law and to correct the fraud being perpetrated upon the membership.

Thereafter, I prepared and filed the pending action as attorney for the plaintiffs. [R. pp. 5-21] All three paragraphs of the amended complaint are proceedings for declaratory relief under Rule 56 of the Federal Rules of Civil Procedure and under 15 U.S.C., §§9 and 22. Paragraph I is to determine the validity of said master contracts and membership agreement, when viewed in terms of the Clayton Act, §2, amended by the Robinson-Patman Act, §2(c), 15 U.S.C., §13(c). Paragraph II is to determine the validity of said master contracts and membership agreement, when viewed in terms of Chapter 504 of the Iowa Code, as to whether NFO, in its present status and for its intended purposes, is qualified to act as a bargaining agent for its members under the immunities of the Clayton Act, §6, 15 U.S.C., §14, as amended by the Capper-Volstead Act, §1, 7 U.S.C., §291. Paragraph III is to determine the validity of said master contracts and membership agreement, when viewed in terms of said Chapter 504, as to whether the immunities of the Clayton Act, §6, 15 U.S.C., §14, as amended by the Capper-Volstead Act, §1, 7 U.S.C., §291, exempts NFO from violating Sections 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C., §§1 and 2, and for other incidental relief.

Counsel for NFO answered the plaintiffs' amended complaint [R. pp. 22-42] and filed a petition to disqualify me as plaintiffs' counsel. [R. pp. 65-71] The grounds relied upon in the petition and the attached affidavit of NFO's president [R. pp. 68-71] were to the effect that knowledge of the material and relevant portions of the public documents made the subject of this suit were secret and confidential and should not have been disclosed by me to NFO's membership, and management had not consented thereto. Plaintiffs' reply to NFO's answer was filed, [R. pp. 43-64] an answer to defendant's motion to disqualify, [R. pp. 72-92) and special pleadings (R. pp. 98-108] thereto were filed, among other papers.

Many, many affidavits in the record from members from various states show they joined NFO, paid their dues, and gave of their time, efforts, and resources to make NFO work in the belief they would get the 4.5%. [R. p. 72 (Exhibit O, pp. 112-158)] None of them knew of these prohibitions. They feel they have been taken advantage of by not being told everything and that the fraud, illegality, and other wrongdoing appearing on the face of the record creates an exception to any attorney-client privilege, if one exists, which would not only require or permit me to inform them of these problems, but to represent them, as trustees herein, for and on behalf of NFO to correct these same problems.

On March 31, 1967, the District Court, nevertheless, ordered my disqualification. [R. pp. 126-127] The Court of Appeals affirmed on Wednesday, May 31, 1967, [Appendix I] and on June 26, 1967, denied a petition for rehearing. [Appendix II]

ARGUMENT

This part concerns the first question.

On page 30 of respondent's brief before the Court of Appeals, it is conceded that the subject matter of the various injunction suits are not substantially related to the pending action. Let us analyze documents in the record on my remaining efforts, which prove they are also unrelated. See, *McMullen* vs. *Hoffman,* 174 U.S. 639, 19 S. Ct. 835, 43 L. Ed. 1117 (1899).

(1) *With reference to the matter in Akron, Ohio.* A comparison of what was prepared and in existence at that time with what was prepared after this suit was filed in Exhibit D-1 [R. p. 97] proves that case involved another *injunction* suit. Exhibit A-1 [R. p. 97] proves Mr. Herman was also mistaken in his affidavit [R. p. 93 (105)] as to what I had agreed to send Mr. Rabe, the attorney; which was Exhibit B-1. [R. p. 97] This is no authority for anything, and as I indicated to Mr. Rabe, it was the best I had on the question he asked me that night in Akron. Being an attorney, he well knew this. Had I gone over there for that purpose, or anything other than to give my viewpoints and my authorities on how I got injunctions dissolved, does it not stand to reason I would have gone prepared with the best I had?

(2) *With regard to the Benson Cooperative Creamery Litigation.* The affidavit of attorney, Richard Hilleren, [R. p. 72 (182-183)] shows it was the violence and other illegal activities which caused him to threaten and almost join NFO as a party defendant in that suit. It reveals that after he and I had a series of meetings in Benson,

NFO was not joined. This is in absolute harmony with and supported by President Staley's letter to me dated September 11, 1965, [R. p. 93 (84)] and my reply thereto dated September 13, 1965. [R. p. 93 (85)]. They show NFO was not legally involved or *affected,* and my job was to keep NFO from becoming involved in those two cases. This is exactly what I did for NFO. Had there been a substantial relationship, copies of the pleadings and brief I sent President Staley and Mr. Rust in my courtesy letter dated July 23, 1965, [R. p. 93 (78-79)] would have been filed as proof.

It is asserted my courtesy letter of May 23, 1966, [R. p. 93 (95)] amounts to an unequivocal admission of being previously employed to represent NFO's best interests in connection with the same master contracts which this suit is attacking. Every time I defended NFO in the injunction suits, I represented NFO's best interests in connection with those contracts, because the holding actions were instigated to force processors to place enough production under contract to activate them. The defendant admits the validity of these contracts were not involved. President Staley's *own letter* proves the same to be true in the *Benson* case.

(3) *With respect to the affidavit of Fred Deardorff, a director.* [R. p. 93 (114-115)] It proves I was trying to disclose my findings on the subject matter of this suit to them at least *before* August 9, 1965. He reveals they were unaware of those problems. They were either persuaded not to listen to me or they did not think enough of what I had to say to listen. Instead, they decided to learn of these highly complicated matters in a second-handed fashion, and then from farmers who were not lawyers or versed in the law. Furthermore, the persons who were

to get the details from me and make the report were the very same ones who already knew about these problems, and who, according to President Staley's affidavit, felt such matters were secret and confidential and should have been withheld from the members. Even though I admit being NFO's general counsel in charge of the injunction suits, his affidavit proves the directors neither considered me as NFO's general counsel in charge of *all* its legal affairs, nor did they employ me to research and uncover these matters for them.

(4) *With regard to President Staleys letter dated August 21, 1965.* [R. p. 93 (81-82)] It should be viewed in connection with Mr. Deardorff's affidavit. It was written about ten days after the same directors' meeting referred to in Mr. Deardorff's affidavit. Speaking only of the grain memo, Mr. Staley said:

> "You will not need to be concerned with *this* matter any further.
>
> "You may, however, proceed *as you have been* on the remaining cases arising from the holding action." (emphasis supplied)

Mr. Staley's letter was totally void of even a remote reference to those matters discussed at the board meeting only ten days previously, about which I had been trying to meet with them. Since Mr. Deardorff's affidavit shows the directors decided to refer matters to Mr. Sinclair, if either Mr. Staley or the officers *had* employed me to dig into these matters, it is certain Mr. Staley would have included my activities concerning the subject matter of this suit as part of those things I was instructed not to be concerned with further when he limited my activities to proceed only as I had been on the remaining cases arising from the holding action. He has proven that matters em-

braced within the pending suit are not closely related to any area in which I was *employed* by either him or the officers to represent NFO.

If any question still remains, his letter to me dated November 19, 1965, [R. p. 93 (92)] removes even the last doubt, when he said:

> ". . . We accept your termination of services as *an attorney* for the NFO . . .
>
> "I sincerely regret that you found it necessary to terminate your employment because I do feel you could still be of *some value* to the organization in *some matters* on which you have had experience." (emphasis supplied)

He has proven I was only considered as *an* attorney for NFO and to be of value to NFO only in the injunction suits.

(5) *With regard to my resignation letter.* [R. p. 93 (90-91)] It is asserted my resignation letter shows it was through specific employment on the grain memo which led me to researching the subject matter of this suit. I will concede to an inaccurate use of words, but under the circumstances, I was not prone to dwell in great detail on the strict order of all the many, many events in my resignation letter. There was no reason to. The very first sentence, however, actually shows the limits of my extra employment, and other documents in the record prove this to be the case. First, it is completely consistent with President Staley's letter of August 21, 1965. Second, Herb Goodman's affidavit, [R. p. 93 (98-101)] shows it was during the second week of April, at least, that a copy was delivered to me. Third, Mr. Staley's letter of August 21, 1965, shows I had finished and made my report on that memorandum by June 5, 1965. It would

have been physically impossible for me to have continued with all of the remaining injunction suits arising out of the holding action, covering the distances involved, plus maintaining the rest of my law practice, plus getting into the tax matters in the grain memo, and after this was done to have also researched all the questions involved in the pending suit, selected only those portions I decided were relevant, reduced them to writing and accumulated 173 pages of research material if I had not started until *after* I got *into* the grain memo. Everyone of us knows there would not have been sufficient time. I had to start my research on the subject matter of this suit long before that time, which I did, as I alleged in rhetorical paragraph 14 of my answer, during the last week of February, 1965. Having overlooked this crucial time factor, a different argument was made which involved Mr. Herb Goodman's letter to me dated June 29, 1965. [R. p. 93 (77)]

(6) *With regard to Mr. Goodman's letter dated June 29, 1965.* Counsel for NFO asserted next that Mr. Goodman's letter shows I was employed to render a legal opinion as to the legality of NFO's master contracts; that it was not until I had examined a copy of the opinion Mr. Goodman forwarded to me from a law firm in Saginaw, Michigan, as to their illegality that I became aware of these problems and started researching the questions involved herein; *that this resulted in a substantial relationship to an area of previous employment,* even though Mr. Goodman admits NFO never received such an opinion from me. *This is almost the same language in* the *Appellate Court's opinion* and appears to be the area of my previous representation found to be substantially related.

That letter could not have been sent in good faith. They knew I had been trying to reach the directors, and they knew I was not going to make it. They sent that letter to eliminate me as a potential threat from disclosing all of these facts I had uncovered to NFO's membership, and there are several items in the record to prove it. First, this crucial time element was overlooked again. I did not receive Mr. Goodman's letter until the first of July, 1965. Mr. Deardorff's affidavit proves I had been trying to meet with the directors on these problems at least *before* their meeting of August 9, 1965. Consequently, I would have had even *less* time to do everything under this argument. Second, if they were really sincere in wanting an opinion, why did they wait one and one-half years after that opinion had been written and circulated and almost six years after the master contracts had been written and signed by various processors before seeking one? Why did President Staley refuse to grant the requests of Alfred Morris and the plaintiff, Roland Waters, both of whom were helping write the master contract for milk, when Mr. Morris wanted to seek the advice of an attorney in its formulation? [R. p. 140 (32-33; 14-18)]

Third, if they really were sincere in wanting a legal opinion, *why did they ask me, of all people?* Mr. Staley's letter makes it clear this was not an area in which they thought I could be of any value to NFO. Mr. Deardorff's affidavit makes it crystal clear this was not an area in which the board would even take their time to listen to me, let alone employing me to get into. The affidavit of the plaintiff, Keith Dare, [R. p. 72 (93-95)] reveals this was not only the same feeling of Harvey Sickels, a director and national secretary of NFO, and of Glen Utley, NFO's senior board member, but it was also the same attitude of *Herb Goodman himself* Furthermore, Mr.

Goodman voluntarily told Mr. Dare that I *had been trying for a long time to meet with the directors to explain the problems to them and make them aware of them,* but Mr. Staley said it was not necessary for me to meet with the board, because the directors were not the boss; that Staley was running the organization and he was the boss. Mr. Goodman also filed his counter-affidavit, referred to above, in which he tried to explain or deny certain charges. It is *extremely important* to observe he refused to deny or explain these remarks attributed to him by Mr. Dare when he surely had a duty to do so, if they were not true.

Since the affidavits of the members [R. p. 72 (112-158)] show the membership was wholly unaware of these problems, *I had to do it on my own.* Even though I did so and admit it, this fact neither justifies my disqualification as plaintiffs' counsel in the pending case, nor does it support the Court of Appeals' finding that the subject matter of this case is substantially related to the subject matter of my previous representation of NFO that would warrant sustaining the District Court's order, which erroneously disqualified me as plaintiffs' counsel herein.

This part concerns the second question.

Even though the Court of Appeals' finding was correct that the pending suit is substantially related to my previous representation of NFO, in so doing that Court erred in holding that the rationale of the three cases it relied upon supported its order which affirmed the District Court's order that disqualified me as plaintiffs' counsel.

First, let us assume master contracts were already activated and this were a suit where I represented a processor against NFO and its members for violation of the anti-

trust laws and for treble damages under the controlling principles set out in *Allgair* vs. *Glenmore Distilleries Co.*, (N.Y.), 91 F.S. 93 (1950). If this were the case, then I can see where the rationale of these three cases might apply. However, a comparison of these three cases with our instant situation shows that the kind of organizations involved, the facts, the purposes back of the rules and the applicable law are all distinguishable.

In the case of *T. C. & Theatre Corp.* vs. *Warner Bros. Pictures,* 113 F.S. 265 (1953), Cooke filed the action on behalf of the plaintiff against Universal for treble damages for violation of the anti-trust laws. He based the suit against Universal upon a government anti-trust conspiracy suit in which Cooke had represented Universal on appeal. (The pending case is an action by the members of NFO, who are acting as trustees on its behalf, for corrective declaratory relief because the officials refuse to do so.) They are acting precisely as a guardian ad litem goes into court to obtain like redress for a client under disability because of incompetency or nonage. See, *Whitten* vs. *Dabney,* 171 Cal. 621, 154 P. 312 (1915).

The court said that as the present counsel for the plaintiff, Cooke would necessarily be called upon to prove against Universal, his former clients, *the very charges* against which he had earlier defended it. (Counsel admits that the injunction and damage suits in which I defended NFO are not even substantially related to the subject matter of the pending case.)

During the preparation of the findings on appeal, in which Cooke represented Universal, he was in full command of all of Universal's legal affairs. He received very much confidential information concerning the innermost workings of Universal in defending them. He was looked

upon for leadership generally and specially, and he was consulted with as to *all* aspects of Universal's activities. (The proven facts show NFO's directors would not take their time to hear what I had to say, and the persident did not feel this was an area in which I could be of any value to NFO. Also, matters made the subject of this action involve only public documents. Furthermore, I was not on a retainer basis or permitted to advise or consult the directors or even sit in on their board meetings.) [R. pp. 72-92 (Affidavit of Roland Waters, Exhibit D, pp. 87-92])

The co-defendants in the above cited action were also co-defendants in the government's, conspiracy action. They, likewise, asked for a disqualification of Cooke from prosecuting the action by the plaintiff against them. The court, however, ruled that the conferences on appeal did not involve a disclosure of anything that was *confidential.* Furthermore, the court ruled that since Cooke took a position that was adverse to a number of said co-defendants on appeal, his present position in representing the present plaintiff against them for the same kind of an action was not *inconsistent* with his previous position against them on appeal. (My letter of December 20, 1965, to Mr. Sinclair, [R. p. 93 (118-138)] shows that my present position with regard to the subject matter of this suit is not inconsistent with my previous position.)

Even though it applies to the next question, this case also recognizes there is an exception to the general attorney-client privilege. The court said at page 268 as follows:

> "He is enjoined for all time, *except as he may be released by law.*" (emphasis supplied)

The case of *Consolidated Theatres* vs. *Warner Bros. Cir. Man. Corp.*, 216 F. 2d 920 (1954), involved another *private* action for treble damages for violation of the anti-trust laws. Nickerson filed this action on behalf of the plaintiff against a large number of motion picture producers, which included Twentieth Century Fox Film Corporation. He based the suit upon the same government anti-trust conspiracy suit as was done by Cooke in the *T. C. Theatre Corp.* case.

Nickerson was employed as an attorney in a law firm, during which time he participated in three motion picture anti-trust suits. He admitted that in each of these cases he had *complete access* to all the records and files of the various companies involved. He arranged the files for presentation to the court. He attended the trial and took notes of the testimony and the general proceedings of the trial. He interviewed employees and managers, who were instructed to give him their fullest cooperation in obtaining all the facts that they wanted. This included details of the innermost workings of these corporations. He analyzed, digested, and organized files containing documentary evidence. He was present at interviews. He helped prepare witnesses to give testimony at the various trials, and helped obtain data on the facts in preparing cases for trial. (I was at national headquarters only a very few times. At no time did I have complete access to anything. Instead of getting the fullest cooperation, I got just the opposite in trying to meet with the board on these matters.)

One of these suits involved a defense of Twentieth Century Fox Film Corporation, one of the principal clients of the law firm where Nickerson was employed. That

same company was a defendant in the case that he was filing on behalf of the plaintiff. Accordingly, a motion for his disqualification was filed.

There was some concern over whether or not he was considered as a law clerk, general counsel, special counsel, or an associate, and what effect, if any, this would have. The court said at page 927 as follows:

> "We do not think that titles have much to do with the real problem here. Canon 6 is devised to protect the *secrets* and *confidences* reposed in the attorney by his client. It is the work done for the client and the access to the confidential information of the client which is crucial in determining whether the obligation of Canon 6 arises." (emphasis supplied)

(No secrets or confidences were reposed in me by NFO concerning the subject matter of this case. Instead, I was prohibited from letting the directors know what I had uncovered on my own initiative and only from public documents. In fact, I was severely criticized in doing so.)

The court held that Nickerson's representation in the former cases involved the *same kind* of law suit wherein he obtained all of the *secret* and *confidential material* which he was now attempting to use against his former client *in order to collect* **damages**. (Again compare the facts of this case with the relevant portions of our instant situation.)

The case of *Cord* vs. *Smith*, 338 F. 2d 516 (1964), is distinguishable on several important grounds, one of which I will refer to in the next question.

In 1934, Young, an attorney, brought an action against Cord for $250,000. attorney fees wherein he alleged, under oath, that he had acted as Cord's attorney in connec-

tion with a matter involving the Los Angeles Broadcasting Company.

Prior to this time, however, while Young was representing Cord, he had prepared a contract for Cord around 1932 wherein Cord agreed to divide equally the profits upon the sale of certain radio stations with Mr. Smith, the manager. When the stations were sold in 1962, Cord refused to honor the contract. Whereupon Smith employed Young to bring an action for *three million dollars damages* against Cord for a breach of that contract. During the course of the proceedings, Cord's attorney discovered that Young had prepared the contract for Cord when he was representing him years prior to that time. (Compare this with the fact I had nothing to do with preparing any of NFO's contracts.) He promptly filed a motion to disqualify Young as Smith's attorney.

In sustaining this motion, the court said at page 523 as follows:

> "The canons that require that a lawyer who has represented a client in a transaction, may not thereafter represent the *other party to the transaction,* in an action against his client *based upon the transaction,* are not to be so readily avoided." (emphasis supplied)

How can the rationale of that rule possibly apply to our instant case?

On July 22, 1967, President Staley prepared and over his own signature circulated to NFO's entire membership, a four page, single-spaced document in which he said, among other things:

> "It's going to take the *support* of the members *because NFO is the members.*"

I agree with President Staley. When I represented NFO, I was representing the members' best interests. They were the ones that paid my attorney fees. I never represented NFO against its members on any subject matter. How can it be rationalized that by representing those same members in an action for declaratory relief in the capacities as trustees for the benefit of their own organization that they are occupying the position of the "other party" to the transaction within the meaning, spirit, and purpose of the rules set forth in *Cord* vs. *Smith,* supra?

It is respectfully submitted that the controlling *principle* of law in the case of *Jacuzzi* vs. *Jacuzzi Brothers, Incorporated,* 218 App. Div. 24, 32 Cal. Rptr. 188 (1963), is squarely on point and the rule to be applied herein. That suit involved an appeal from an order denying the appellant's motion to disqualify two attorneys who formerly represented the corporation. In fact, Mr. Gray, one of the former attorneys, had represented the corporation for over *twenty-five years,* and during a portion of that time he served as *chairman of the board of directors.* After he resigned, however, he had no further connection with the corporation. (After I resigned, I had no further connection with NFO.)

That action was filed by Mr. Gray as a stockholders' derivative suit. It was brought for and on behalf of the corporation by these stockholders for the purpose of restoring to the corporation property and assets alleged to have been improperly transferred for an inadequate consideration.

The appellant's principal contention on appeal was that Gray had previously represented the corporation. Consequently, this prevented him from representing the minori-

ty stockholders in that action. It was held on appeal that the action was really brought for *the benefit* of the corporation, who was Gray's former employer. Therefore, the action was not really *adverse* to the corporation; to the contrary, it was brought for and on behalf of the corporation itself. (This rule would apply with added force to a not-for-profit agricultural corporation.)

The stockholders for whom Gray was then acting as attorney were really, in effect, guardians ad litem and trustees for the benefit of the corporation. At page 192 of the 32 Cal. Rptr. the court concluded by saying:

> "Since Gray acts for the benefit of the corporation he previously represented it is apparent he is not representing an interest adverse to the corporation, and the prohibition of Rule 5, Rules of Professional Conduct, *can have no application.*" (emphasis supplied)

This part concerns the third question.

Even though it is deemed that a substantial relationship exists to my previous representation, and even though this finding is deemed to be supported by the rationale of the cases relied upon by the Court of Appeals, it still committed error in holding that this was dispositive of the controlling issue when all of the record and the law appertaining thereto are considered. See, *McMullen* vs. *Hoffman,* supra. Wrongdoing, fraud, misrepresentation, proven concealment of material facts and information from the members, and other illegality appear, even on the very face of the record. It has been contended from the beginning this creates an exception to any attorney-client privilege, if one existed otherwise.

The following hypothetical is submitted to point up the question herein. Assume I was joined as a party de-

fendant in an action against NFO's officials for failure to make the disclosures required by law because I knew of these problems but remained silent, too. Would my defense of the attorney-client privilege be sustained, or would I suffer the same or worse fate than the five year prison term a young attorney by the name of Hett received in *Hett* vs. *United States,* 353 F. 2d 761, Certiorari denied 384 U.S. 905 (1966), because he knew of his client's plans and intentions to commit a crime but did not report this to the proper authorities? The case of *United States* vs. *Hoffa,* 349 F. 2d 20 (1965), even though on a different subject matter, provides the answer to this question at page 37, where the following rule appears:

> "the attorney-client relationship would offer no shield to either client or attorney if the client had been engaged in a plan to commit a crime in the future."

As between the two social policies competing for supremacy, the court in cf., *State* vs. *Kirkpatrick,* 220 Iowa 974, 263 N.W. 52, 55 (1935), laid down this rule:

> "It is a mistaken notion to think that an attorney has the right to assist in the perpetration of a fraud, and a mistaken notion that one having in mind the perpetration of a fraud or a crime can safely entrust this knowledge to an attorney any more than to anybody else."

In *People* vs. *Warden of County Jail,* 150 Misc. 714, 270 N.Y.S. 362 (1934), the court said at page 371:

> "A client who consults an attorney for assistance in connection with a contemplated violation of law can expect no help from the law. He cannot complain if the truth is allowed to be told. A mere charge of wrongdoing will not suffice. There must be *'something to give colour to the charge'."* (emphasis supplied)

The court said this conclusion was inevitable, if we are to maintain the *honor of the profession,* and make an officer of the court an agency to advance the ends of justice, rather than to be used as an instrument to subvert them.

The following rule appears in the case of *People* vs. *VanAlstine,* 57 Mich. 69, 23 N.W. 594, 598 (1885), concerning attorney-client privileges:

> "But there are exceptions to the general rule, based upon public policy and public security. Professional communications are not privileged when such communications are for an unlawful purpose, having for their object the commission of a crime. They then partake of the nature of a conspiracy, or attempted conspiracy, and it is not only lawful to divulge such communications, but under certain circumstances it might become *the duty* of the attorney to do so." (emphasis supplied)

In *Gebhardt* vs. *United Rys. Co. of St. Louis,* (Mo. Sup.), 220 S.W. 677 (1920), an attorney went forward voluntarily and was permitted to testify against his former client in order to prevent the consummation of a contemplated fraud. At page 679 the court further stated:

> "The testimony of the witness Grant Gillespie was therefore also admissible, *even if he had been plaintiff's attorney,* which he was not." (emphasis supplied)

Henry S. Drinker in his book on legal ethics at page 137 says:

> "A lawyer representing a corporation may and should disclose to its directors or members defalcations by the managers which the lawyer learned about in connection with his representation of the corporation."

The affidavit of Fred Deardorff shows this is what I tried to do.

Canons 16, 32, and 41 of the Canons of Professional Ethics, as amended, ABA, are especially applicable. The record shows I tried to comply with all three of them. In fact, I tried for months to meet with the board of directors, I provided NFO's officials 173 pages of research material, I wrote counsel a 21 page written opinion, and spent four hours with him so appropriate steps might be taken.

In July of 1961, Mr. James A. Gardner, a member of the California Bar (Fresno), published an excellent article entitled, *"The Crime or Fraud Exception to the Attorney-Client Privilege"*, in 47 ABA 708. Even though he is quick to recognize the attorney-client privilege and the reasons for it, he also points out that this is only one of the components which go to make up this more inclusive whole. He states that the crime or tort exception represents a healthy counter-balance to the attorney-client privileges which can serve, *even more than it has in the past,* to protect the honor of the profession and to frustrate not only the person who would use the law to achieve a particular unlawful objective but also the professional crook when acting in his capacity as such.

With regard to the question of fraud, the court in *Pittman* vs. *Lageschulte,* 45 Ill. App. 2d 207, 195 N.E. 2d 394, 399-400 (1964), defined it as follows:

> "Fraud includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the supression of truth or the suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or by silence, by word of mouth, or by look or gesture. . . . If fraud be proved, it vidiates all transactions touched by it."

See also, *Gibbons* vs. *Brandt,* 170 F. 2d 385, Certiorari denied 336 U.S. 910, rehearing denied 336 U.S. 929 (1948); *Isaacs* vs. *United States,* 301 F. 2d 706 (1962).

Fraud can be classified as *actual fraud,* which amounts to deception intentionally practiced inducing another to part with property or some legal right; or *constructive fraud,* amounting to a breach of a legal or equitable duty which arose irrespective of moral guilt, and is fradulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests; or *implied fraud,* consisting of representations implied from conduct as distinguished from statements actually made. *Stern* vs. *National City Co.,* 25 F.S. 948, affirmed *City Co. of New York* vs. *Stern,* 110 F. 2d 601, reversed 312 U.S. 666, mandate conformed to 142 F. 2d 449 (1939).

Constructive fraud usually arises where a fiduciary or confidential relationship exists. In such instances it is unnecessary to prove deliberate or intentional fraud. *Cumberland Portland Cement Co.* vs. *R.F.C.,* 140 F.S. 739, affirmed 232 F. 2d 930 (1956). See also, *Lawton* vs. *Strong,* 87 Ariz. 17, 249 F.2d 299 (1957).

Furthermore, cupable ignorance furnishes no immunity for false representations or concealment. *Anderson* vs. *Tway,* 143 F. 2d 95, Certiorari denied, 324 U.S. 861 (1945).

There is always an affirmative duty of the utmost good faith to disclose all material facts, and a failure to do so constitutes fraud. *Allen Realty Co.* vs. *Uhler,* (Ind.), 146 N.E. 766 (1925); *Gidney* vs. *Chapple,* (Okla.), 110 P. 1099 (1910). See also, 37 C.J.S., Fraud, §16, p. 248, notes 24 and 25.

A fiduciary has an affirmative obligation to employ reasonable care to avoid misleading those who depend

upon him for guidance. See, *Securities & Exchange Commission* vs. *Capital Gains Research Bureau, Inc.*, (N.Y.), 375 U.S. 180 (1963). This is especially true where one has superior knowledge or knowledge which is not usually within the fair and reasonable reach of the other party. When a person remains silent with regard to an important matter which he knows the person relying upon him is depending upon, believing he is getting the true state of facts in which to enable him to judge the expediency of his bargain for himself, and the fiduciary has not made a full and complete disclosure, or there has been only a partial disclosure, which misleads and conveys false impressions and such half-truths or nondisclosure constitutes a concealment of all the facts, then the cases uniformly have held this constitutes fraud whether it be actual, constructive, or implied. *Berger* vs. *Amana Society,* (Iowa), 111 N.W. 2d 753 (1962). See also, *Equitable Life Insurance Co. of Iowa* vs. *Halsey, Stuart & Co.,* 312 U.S. 410 (1941); *Strand* vs. *Librascope, Inc.,* 197 F.S. 743 (1961); *Consolidated Oil & Gas, Inc. vs. Ryan,* 250 F.S. 600 (1966); *Nichaolds* vs. *McGlothlin,* 330 F. 2d 454 (1964); *United States* vs. *Certain Property, etc.,* (N.Y.), 306 F. 2d 439 (1962); *Texas Tunneling Co.* vs. *City of Chattanooga, Tenn.,* 204 F.S. 821, affirmed in part, revs'd in part, 329 F. 2d 402 (1962); *Lawson* vs. *Haynes,* 170 F. 2d 741 (1948); *Fernandina Shipbuilding & Dry Dock Co.* vs. *Peters,* (Fla.), 283 F. 621 (1922); *Murillo* vs. *Hernandez,* 79 Ariz. 1, 281 P. 2d 786 (1955); *Callahan* vs. *Wolfe,* (Idaho), 400 P. 2d 938 (1965); *Reeder* vs. *Guaranteed Foods, Inc.,* (Kan.), 399 P. 2d 822 (1965).

The case of *Berger* vs. *Amana Society,* supra, was a stockholders' derivative action to nullify an amendment to the articles of incorporation, based on the violation of

contract rights, fraud, misrepresentation, and deceit of the stockholders by the officers of the Amana Society. The lower court dismissed the action. However, on appeal it was held the officers had taken advantage of the faith and confidence that had been placed in them by the great majority of class A stockholders so as to procure the adoption of an amendment to the articles of incorporation destroying certain rights and which required certain shares of stock to be redeemed for cash. The appellate court said this went to the very vitals of the Society.

The court found that at stockholders' meetings there was an attempt to explain the nature of the proposed amendment. In fact, a prepared statement had been circulated, but in each of these instances there was wholly lacking any information on the vital question of the future control of the Society and what effect the amendment would have upon 300,000 shares of class B stock. The court found there had not been a full and complete disclosure to them of the full impact of what the amendment would do or was designed to do. The appellate court ruled that once the officers undertook such a duty to explain the nature of what the amendment proposed to do, it was incumbent upon them to do this wholly, specifically, and completely. The court said it could not help but recognize the fact that many members of the Society had no more than an eighth grade education, and therefore they depended upon their leaders for proper guidance. However, they did have the intellect and intelligence to vote independently on matters if they were properly explained to them. The court ruled this constituted a case of fraud that had been perpetrated upon the membership because equity and good conscience demanded that when the matter was attempted to be explained to them, particularly when it went to the vitals of

the organization, that a full, fair, and complete disclosure had to be made. Consequently, the lower court erred in holding there had been no fraud or deceit perpetrated upon the membership, even though there was no evidence in the record that the acts of the officers were done intentionally. The case was reversed, and full attorney fees were awarded for the plaintiffs' attorney, because this was an action that was brought for and on behalf of the corporation itself and not just the plaintiffs as certain individuals.

The president's affidavit attached to the motion as grounds for my disqualification is positive proof [R. pp. 68-71] that the official position of management is and has been intentionally opposed to and in direct violation of the fiduciary responsibilities imposed upon them by law, which demands that a full, complete, and fair disclosure of all the material facts and applicable law concerning NFO must be made to its membership. This in and of itself constitutes fraud and deception as a matter of law, *without any consideration of the merits.*

The membership had every right to be informed of the language appearing in Section 504.10 of the Iowa Code and in Articles IX and XI of NFO's Articles of Incorporation.

They had every right to know about the interpretations placed on this section by the highest court in Iowa in making up their own minds as to the benefit of their bargain in joining NFO. See, *State* vs. *Amana Society*, 132 Iowa 304, 109 N.W. 894, 895 (1906). In construing the meaning of that statute, the court said:

> ". . . By the third section, [referring to Section 1645 and now 504.10] distribution of the property, by

dividend or otherwise, prior to dissolution, is not allowed."

The court went on to make a distinction between corporations organized under that law and those for pecuniary profit when it said:

> "The distinction between corporations organized under this chapter and those for pecuniary profit has relation, not to whether one or the other shall earn or receive an income, though this may be important as evidence, but to the design had in organizing and objects sought to be obtained; not to methods pursued so much as the things to be accomplished. *If the purpose is to earn money or property, if financial gain is the main or controlling object for which the corporation is created then, regardless of other circumstances, it is within the class designated as corporations for pecuniary profit.*" (emphasis supplied)

See also, *People* vs. *Universal Service Ass'n*, 365 Ill. 542, 7 N.E. 2d 310 (1937), where a similar statute was involved. In ousting the defendant as a non-profit corporation, the court said at page 312 that:

> "The scheme, when reduced to its essentials, is a business arrangement designed to produce a profit."

In *State* vs. *Hutterische Bruder Gemeinde*, 46 S.D. 189, 191 N.W. 635 (1922), the court vacated the articles of incorporation, and it was *dissolved as a non-profit corporation* because the principal business of the corporation was farming for purposes of sustaining its colonies.

The case of *Read* vs. *Tidewater Coal Exchange*, 13 Del. Ch. 195, 116 A. 898, 904 (1922), sheds further light upon this particular subject, when it said:

> ". . . A corporation is for profit when its purpose is, whether dividends are intended to be declared or not, to make a profit on the business it does which in reason belongs to it and which if its affairs are administered in good faith would be available for dividends. Subterfuges by which a corporation allowed its profits to be diverted to those owning it, though not in the form of dividends would manifestly not remove from the corporation its feature of profit making. Nor would a mere declaration in its certificate of incorporation that it was organized not for profit, be sufficient to stamp upon it a non-profit character . . . . The term 'profit' as employed in the section under discussion means gains or earnings that are expected to come into the possession of a corporation."

A profit of at least 1.5% over the non-member is the stated goal of NFO.

With regard to the 5% provision in the master contracts, [R. pp. 5-21 (Exhibit F)] the members had every right to know that Congress has passed laws with severe penalties to violators, which our courts have unanimously interpreted for over thirty years, which will not allow both a selling and a buying service to opposite sides of the same sales transaction to be combined in one person because it would open a wide field for fraud and oppression, in making up their own minds as to the benefit of their bargain in joining NFO. See, *Great Atl. & Pac. Tea Co.* vs. *FTC,* 106 F. 2d 667 (1939); *Quality Bakers of America* vs. *FTC,* 114 F. 2d 393 (1940); *Oliver Brothers* vs. *FTC,* 102 F. 2d 763 (1939); *Kentucky Rural Elec. Coop. Corp.* vs. *Maloney Elec. Co.,* 175 F.S. 250 (1959). See also, Trade Practice Rules for the Fresh Fruits and Vegetables Industry, 30 Fed. Reg. 5331 & 5332 (1965).

Some might feel I should not have included the foregoing on the 5% provision, because this falls within the class of justiciable issues. I would be the first to agree if it were truly a valid justiciable issue of first impression and a favorable decision could resolve NFO's problems. Even though we assume for the moment there is no violation of the anti-trust laws, and NFO can get and keep the 5% it will be receiving from processors, NFO is still doomed to fail. This fund must belong either to NFO or its members. If NFO proves the fund belongs to its members, and therefore does not fall within the prohibitions of either Section 504.10 of the Iowa Code or Article IX of NFO's Articles of Incorporation, in so doing it will have proven it is on a for profit basis and subject to having its corporate charter revoked. *State* vs. *Hutterische,* supra; *People* vs. *Universal Service Ass'n,* supra; *Read* vs. *Tidewater Coal Exchange,* supra. If it proves the fund belongs to NFO it will have proven the fund falls within the prohibitions of Section 504.10 and Article IX. *State* vs. *Amana Society,* supra; *People* vs. *Universal Service Ass'n,* supra. If the funds cannot be distributed until dissolution, then its members will be receiving 3% less cash than non-members for their products. There are no farmers joining NFO today with that thought in mind. Hence, the fraud still exists, but the general membership is wholly unaware of it. The officials know this, and are trying to hide this fact and mislead thousands, and ultimately millions, of farmers. This is to say nothing about the tragedy that would exist if everything had continued just as it has in the past, and everyone waited until after master contracts were activated when vast sums of money had been accumulated, and then this suit were filed, either by the plaintiffs, or by processors. to recover damages.

Section 504.8 of the Iowa Code requires that corporations organized for agricultural purposes shall have their articles of incorporation provide a mode by which any member may at any time withdraw therefrom, subject to the rights of creditors of the corporation. However, NFO's articles of incorporation make no provision for this requirement. [R. pp. 5-21 (Exhibit B)] Instead, the membership agreement [R. pp. 5-21 (Exhibit E)] states it is irrevocable for a period of three years, and unless notice of cancellation is given in accordance with the terms of the membership agreement, it is automatically renewed for like periods of time.

Now, let us assume that when these future suits were filed, the decision at that time went against NFO as to the validity of its master contracts. The members promptly take steps to see that the corporation's existence is terminated so they can share upon final dissolution. Who could share therein when claims are filed? The membership agreement and master contracts are intricately connected with each other. If one is deemed to be illegal, then so is the other. See, *Rathke* vs. *Yakima Valley Grape Growers' Ass'n,* (S. Ct. Wash.), 192 P. 2d 349 (1948); *Body-Steffner Co.* vs. *Flotill Products, Inc.,* (Calif.), 147 P. 2d 84 (1944).

Any claim for a distributive share would have to be based upon both an illegal master contract and an illegal membership agreement. As we all know, no court will entertain any kind of an action for either party to the transaction when it is predicated upon an illegal document.

Even if the contracts were deemed to be valid, the result would be the same, because NFO's articles of incorporation do not provide for the requirement set out in

Section 504.8 for a member's right to withdraw at any time. See, *Oklahoma Cotton Growers' Ass'n* vs. *Salyer,* 114 Okla. 77, 243 P. 232 (1926); *McLain* vs. *Oklahoma Cotton Growers' Ass'n,* 258 P. 269 (1927); *Pruitt* vs. *The Oklahoma Steam Baking Company,* 39 Okla. 509, 135 P. 730 (1913). Who else is left to receive the whole fund except the State of Iowa?

In answer to the claim that these questions constitute matters of law or opinion, upon which no action can be predicated for having perpetrated a fraud upon the membership, it is submitted that such an assertion does not apply where it involves a fiduciary relationship such as in the instant situation. See, *Scott* vs. *Burnight,* 131 Iowa 507, 107 N.W. 422 (1906); *Schneider* vs. *Schneider,* 125 Iowa 1, 98 N.W. 159 (1904); *Harris-Emery Co.* vs. *Pitcairn,* 122 Iowa 595, 98 N.W. 476 (1904); *Stephens* vs. *Collison,* 249 Ill. 225, 94 N.E. 664 (1911); *Miller* vs. *Osterlund,* (Minn.), 191 N.W. 919 (1923). This is especially true where the opinions or statements of the fiduciary are made under circumstances such that they may be regarded as amounting to positive affirmations of fact. See the statements of NFO's president in the November 17, 1962, issue of *Prairie Farmer* magazine. [R. p. 94 and attached Exhibit Z] In such cases, they will be treated as representations of fact for purposes of deceit. *Mercer* vs. *Elliott,* 25 Cal. Rptr. 217 (1962). Once again, fraud appears on the face of the record, as set out in my brief to the Court of Appeals. A comparison of the principles set forth in *Harris-Emery Co.* vs. *Pitcairn,* supra, with the instant situation shows they are especially applicable to this question.

Now, let us go back to *Cord* vs. *Smith,* supra, a case relied on by the defendant and the Court of Appeals. I,

too, would like to quote the famous words of Judge Cardoza in *Meinhard* vs. *Salmon,* 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928), in defining the duties of fiduciaries and trustees:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

Since the record shows the officials have violated the very authority upon which they rely, and these violations have been set up as the grounds for my disqualification, is it not clear there has been a lowering and undermining of the rule of undivided loyalty by the "disintegrating erosion" of making them a particular exception?

The very nature of farming and the fact that farmers must deal cooperatively with one another for the good of all, necessarily involves a greater and higher degree of trust and confidence in management than that required of regular for-profit corporations where stockholders may or may not receive a dividend on their investment in the company.

Consequently, the extreme and vital importance of requiring management to make a full, fair, and complete

disclosure of all material facts and applicable law to members about their own farm organizations *cannot* be overlooked or ignored.

Now, let us return to the hypothetical set out at the very first of this question. Since I have already informed the membership of this fraud, the question as to whether I should have done so is now moot. However, the question that is now before the Court as to whether I have a duty, or the right, to continue representing the plaintiffs in this case stems from exactly the same principle this Court would have had to apply if my original hypothetical question, where I knew but remained silent, were before it for decision. *Hett* vs. *United States,* supra; *United States* vs. *Hoffa,* supra.

Counsel contends that even though I might have had a duty to inform the membership, this does not mean that I can represent them in this suit. This argument proceeds upon a wrong premise. It is correct to say that if I had a duty, or a right, to tell them about these problems in this particular case, then I had a corresponding duty or right to represent them in seeking timely, corrective declaratory relief on these identical problems.

The controlling principle in *Croce* vs. *Superior Court,* 21 Cal. App. 2d 18, 68 P. 2d 369 (1937), is on all fours with this proposition. The petitioner sought to disqualify the attorney who was representing the adverse party in a law suit. The court said at p. 19 of 21 Cal. App. 2d as follows:

> "And while no cases precisely in point have been cited by either side *it would seem to follow necessarily* that if under the circumstances stated an attorney is not disqualified from serving as an adverse witness, *it cannot be held* that under the same circumstances

he is disqualified from serving as an adverse attorney." (emphasis supplied)

When you analyze the District Court's order, [R. pp. 119-120] it reaches the same conclusion as set out in *Croce* vs. *Superior Court,* supra, except on the other side of the matter. By enjoining me from taking any further action, directly or indirectly, it follows necessarily from the District Court's order that I should never have disclosed this fraud and illegality to the membership. However, let us assume some other attorney filed this suit and subpoenaed me as a witness. In addition to the cases heretofore cited which show beyond a doubt I would have been permitted to testify, I would refer to the old English classic of *Annesley* vs. *Earl of Anglesea,* Howell's State Trials, Vol. 17, p. 1139 (1743), the controlling principle of which would apply to this hypothetical.

This was a suit for *ejectment* where a nephew claimed vast estates held by his uncle as the supposed heir of his deceased brother, who was the father of the plaintiff. The young nephew claimed to have been kidnapped in his youth by contrivance of the uncle and shipped to the colonies. Returning from his servitude, he filed this suit. Meanwhile, however, while hunting with friends, he killed a game keeper. The uncle then employed an attorney to start a prosecution for murder, saying, "I would give 10,000 pounds to see him hang." This particular statement was sought to be proved from that attorney's testimony against the uncle *in the ejectment suit.* An objection was made that this statement was not made in connection with a defense in that suit. Furthermore, it was confidential and could not be disclosed.

Sergeant Tisdall, attorney for the plaintiff, argued that if he was employed as an attorney in an unlawful or

wicked act *his duty to the public obliged him to disclose it.* He said that no private obligations could dispense with that universal one which lies on every member of the society, to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare. For this reason he apprehended that if a secret that is contrary to the public good, such as a design to commit treason, murder, or perhaps perjury, comes to the knowledge of an attorney, even in a cause wherein he is concerned, *the obligation to the public must dispense with the obligation to the client.*

The defendant's lawyer, *Mr. Harward,* argued just the opposite. Judge Mounteney, B. said at page 1241 as follows:

> "For God's sake then let us consider, what will be the consequence of the doctrine now laid down, (by the defendant) and so earnestly contended for, that such a declaration made by any person to his attorney, ought not by that attorney to be proved? A man (without any natural call to it) promotes a prosecution against another for a capital offense; he is desirous and determined, at all events, to get him hanged; he retains an attorney to carry on the prosecution, and makes such a declaration to him as I have before mentioned, (the meaning and intention of which, if the attorney hath common understanding about him, it is impossible he should mistake); he happens to be too honest a man to engage in such an affair; he declines the prosecution; but he must never discover this declaration, because he was retained as attorney. This prosecutor applies in the same manner to a second, a third, and so on, who still refuse, but are still to keep this inviolably secret. At last, he finds an attorney wicked enough to carry this iniquitous scheme into execution. And after all, none of these persons are to be admitted to prove

> this, in order either to bring the guilty party to condign punishment, or *to prevent* the evil consequences of his crime with regard to civil property. *Is this law? Is this reason? I think it is absolutely contrary to both.* . . . The declaration now offered to be proved, is of that nature, and so highly criminal, that, in my opinion, mankind is interested in the discovery; and whoever it was made to, *attorney or not attorney, lies under an obligation to society in general, prior and superior to any obligation he can lie under to a particular individual, to make it known.*" (emphasis supplied)

Mankind is interested in what I uncovered. It is difficult to imagine an attorney having a much greater obligation to society in general, prior and superior to any obligation I could lie under to the officials of NFO, to make this fraud known and of the plans and ever-increasing likelihood of placing from 60% to 100% of our nation's food supply under illegal arrangements, which are bound to end up wrong, regardless of which way one argues.

When the District Court's order is extended to its ultimate conclusion, it necessarily holds that no attorney who ever represented NFO could be admitted to prove this in order to prevent these consequences. Otherwise, I would not have been disqualified. Therefore, it would be absolutely contrary to both law and reason, that when I was subpoenaed as a witness by the other attorney, for the District Court to rule I was not permitted to testify.

Now, let us further assume that instead of this other attorney calling me as a witness I was either employed to take over the case for the plaintiffs or file it originally, as I have done. This throws *Groce* vs. *Superior Court*, supra, *directly on point* and proves that error was committed when the Court of Appeals affirmed the District

Court's order disqualifying me as plaintiffs' counsel in this particular case. This error was compounded when the Court of Appeals denied my petition for rehearing. I have contended from the beginning, and emphasized this in my oral argument, that the fraud in the record created an exception to any existing attorney-client privilege.

Counsel for NFO also recognized on oral argument that the Court would have to decide if this created such an exception. However, it cannot be determined from the Court of Appeals' original opinion whether it considered this fraud as such exception and decided against it. Therefore, the petition for a rehearing was filed, which specifically pointed out, among other things, that this question had either been overlooked or ignored and the consequences of so doing.

The Court of Appeals should have granted a rehearing, even though we assume this was the first time the fraud or illegality was disclosed or pointed out. This proposition is supported by the rationale of the line of cases represented by *McMullen* vs. *Hoffman,* 174 U.S. 639 (1899); cf., *Primeau* vs. *Granfield,* 193 F. 911 (1911); *Memphis Keely Inst.* vs. *Leslie E. Keeley Co.,* 155 F. 964 (1907); *Teoli* vs. *Nardolillo,* 23 R.I. 87, 49 A. 489 (1901).

Even though I have feelings the same as anyone else, I hasten to add I am not thinking of myself in bringing this appeal. This fact should be obvious. I voluntarily withdrew [R. p. 115] and offered my affidavit under the penalties of contempt that I would not have another thing to do with this case in any way so the plaintiffs could employ other counsel of their own choice [R. pp. 116-118] and expedite the case on the merits for the good of all concerned. [R. pp. 121-122] However, when counsel still insisted upon an order disqualifying me notwith-

standing, [R. pp. 119-120] and it became apparent that one would be entered, I had to re-enter my appearance [R. p. 125] in order to be able to appeal that order. If it were left to stand, it would overturn the whole doctrine that fraud constitutes the exception to an attorney-client privilege, and it would open the door to similar kinds of fraudulent activity across the country against farmers.

I knew that a decision on the merits should be expedited, and the Court of Appeals agreed when it granted my petition to expedite on its calendar. Even so, before I appealed, I could not escape the fact that unless I did appeal from the District Court's order, its effect would remain with all of us as a by-product of the case in chief, long after it has been disposed of and regardless of its final result.

I have no desire to fight the way this case has gone. However, from the time I uncovered this, there has been no way for me to dispose of it. This fact still remains, but now for a different reason. If the District Court's order becomes the law, then not only is my predicament typical of the general condition in which other members of our profession will find themselves, but it will encourage similar or possibly worse activity by others who are so inclined. Furthermore, this will be done under such conditions that members of our profession will be the only ones likely to detect it. Herein lies the great harm that will be done as a result of this order, unless it is reversed and my reinstatement as plaintiffs' counsel is ordered by this Court. As an officer of this Court, I could not let this happen on my own initiative.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Court should grant the Petition for Review because the Court of Appeals has rendered a decision contrary to the rationale in *Hett* vs. *United States,* supra. This Court denied certiorari, 384 U.S. 905 (1966), because Hett *did not tell* what he knew about a crime that was to be committed in the future. It would be in direct conflict with that decision to deny this petition for a writ of certiorari, because *I did tell* the members about a fraud to be committed when master contracts are activated. The effects of the order of the Court of Appeals, when viewed in terms of *Hett* vs. *United States,* supra, and *United States* vs. *Hoffa,* supra, will make it impossible for an attorney to do the right thing, since the attorney-client relationship offers no shield to either the client or the attorney if the client has been engaged in a fraudulent scheme to be committed in the future. See also, *Grummons* vs. *Zollinger,* (Ind.), 240 F.S. 63 (1964), which held that the sanctity of communications between an attorney and client is not required to be maintained in a situation where it is made in furtherance of crime or fraudulent scheme or activity yet to be performed.

The order of the Court of Appeals is also in direct conflict with *McMullen* vs. *Hoffman,* supra. That case said the principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation. One does not have to read past the motion for my disqualification to see that it is founded upon the affidavit of NFO's president, which proves a violation of the law amounting to a fraud upon the membership.

The decision of the Court of Appeals is in direct conflict with the line of cases represented by *Primeau* vs.

Granfield, supra. That court said it had a duty to examine into charges of fraud and illegality. When they were disclosed in a case, the law is required to refuse its aid, regardless of the fact that with the fraud and illegality absent, the plaintiff might appear entitled to relief. In the instant situation, the Court of Appeals either refused to examine into or it ignored the fraud which is disclosed on the face of the record. This is especially true since these facts were again pointed out in the petition for a rehearing, which was denied.

The decision of the Court of Appeals is in direct conflict with the line of cases represented by *Memphis Keely Inst.* vs. *Leslie E. Keeley Co.,* supra, which held that the court had to recognize the fraud in order to discourage fraud and wrongdoing upon the public. The order sought to be reviewed in the instant situation will not only encourage such activity, but it will silence members of our profession from doing what Canons 16, 32, and 41 and the law require of them under the penalties of *Hett* vs. *United States,* supra, and *United States* vs. *Hoffa,* supra.

The decision of the Court of Appeals confines and limits the definition of what constitutes fraud as set out in *Isaacs* vs. *United States,* supra; *Gibbons* vs. *Brandt,* supra; *Pittman* vs. *Lageschulte,* supra; *Allen Realty Co.* vs. *Uhler,* supra; *Securities & Exchange Commission* vs. *Capital Gains Research Bureau, Inc.,* supra; and especially *Berger* vs. *Amana Society,* supra.

The decision of the Court of Appeals is in direct conflict with the rationale of the line of cases represented by *Jacuzzi* vs. *Jacuzzi Brothers, Incorporated,* supra. Unless this order is reversed, there will be no way for corporate counsel to represent his client in such circum-

stances as these. The corporation cannot do it alone. If the officers will not act, and counsel cannot reach its governing body to inform them, then the only ones left are the members, and as was said in *First Nat. Co.* vs. *C.I.R.*, 289 F. 2d 861 (1961), the ones to whom fiduciary duties are owed are the only ones that have a right to set a breach of these duties straight. If, under these circumstances, counsel cannot tell its members, who really make up the organization, then there will be no way for them to know about matters until after the damage is done. This will place farmers at the complete mercy of those in positions of trust and confidence to whom they must look for guidance in sustaining their very existence. The offer of proof contains typical examples of what can be expected.

This case is analogous to prosecuting a man for murder. The defendant admits killing the person involved, but he says, and the record proves, he did it in self-defense. Nevertheless, the court orders his execution without so much as commenting on the question of self-defense. Thereupon, the defendant asks the court, "What about my defense of self-defense?", and the court merely says, "Hang him!"

Every lawyer and every bar association across our land, even though they may not yet know about this case, are vitally interested in knowing whether fraud now constitutes the exception to the attorney-client privilege. Every farm organization wants to know what its duties are to their members. Every farm corporation's counsel wants to know what they must do and what they cannot do in representing their corporate client's best interests when they discover its officers are perpetrating a fraud upon its membership, and their corporate client's struc-

ture, when viewed in terms of its stated plans, reveals it is bound to fail, regardless of which way it goes.

It is clear to see that the order of the Court of Appeals has uprooted and overturned some of the most basic and fundamental principles which govern our whole society. The law cannot permit, much less require, the abandonment of the controlling legal precedents herein cited, which hold that in the final analysis, fraud must constitute an exception to the attorney-client privilege if there is to be any semblance of maintaining the honor of our profession and making an officer of the Court an agency to advance the ends of justice, rather than to be used as an instrument to subvert them.

The order of the Circuit Court of Appeals for the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

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WILLIAM D. HALL,
Petitioner.

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS, 60604

May 31, 1967

Before

Hon. John S. Hastings, Chief Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

No. 16232

ROLAND WATERS, et al.,
Plaintiffs,

vs.

NATIONAL FARMERS ORGANIZATION, INCORPORATED,
Defendant.

WILLIAM D. HALL,
Petitioner,

vs.

NATIONAL FARMERS ORGANIZATION, INCORPORATED,
Respondent.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

APPENDIX I

This appeal from an order of the District Court disqualifying and enjoining the petitioner, William D. Hall,

and the law firm with which he is associated, from participating directly or indirectly as counsel for the plaintiffs in Civil Action No. IP-66-C-440 (Roland Waters, et al., v. National Farmers' Organization, Incorporated) pending in the District Court comes before this Court pursuant to leave granted under the provisions of 28 U.S.C.A. §1292(b).

This Court having considered the petition for leave to appeal and attached documents, respondent's answer thereto, and the record certified to this Court by the District Court as well as the memorandum briefs filed by the respective parties, and having heard oral arguments in open court by counsel for the parties, and having taken the matter under advisement for decision, the Court has conferred thereon and is now of the opinion and accordingly holds and adjudges that the order from which this appeal was allowed is supported by the record herein and the law appertaining thereto.

And, in this connection, the Court is of the opinion that the rationale of Consolidated Theatres v. Warner Bros. Circuit Management Corporation, 2 Cir, 216 F. 2d 920; Cord v. Smith, 9 Cir., 338 F. 2d 516; and T. C. Theatre Corp. v. Warner Bros. Pictures, Inc., D.C. S.D.N.Y., 113 F. Supp. 265 is dispositive of the controlling issue presented for determination herein, the record before the District Court having disclosed that the matters embrace within the pending suit are closely and substantially related to a subject matter included within the petitioner's previous representation of National Farmers Organization, Incorporated.

WHEREFORE the order from which this appeal was allowed is affirmed and the clerk of this Court is directed to enter the judgment of the Court accordingly.

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS, 60604

Monday, June 26, 1967

Before

Hon. John S. Hastings, Chief Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

No. 16232

ROLAND WATERS, et al.,
Plaintiffs,

vs.

NATIONAL FARMERS ORGANIZATION, INC.,
Defendant-Appellee,

APPEAL OF WILLIAM D. HALL,
Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

APPENDIX II

IT IS ORDERED by the Court that the petition for a rehearing of this cause filed by the appellant herein, be, and the same is hereby, DENIED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 641

WILLIAM D. HALL,

Petitioner,

vs.

NATIONAL FARMERS ORGANIZATION, INCORPORATED,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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7 U. S. C. § 291 .....2, 41
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Drinker, Legal Ethics, pp. 135, 137, quoting from W. H. Taft Ethics In Service (1915) 21, 49

Canons of Professional Ethics of The American Bar Association 28

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 641.

WILLIAM D. HALL,

Petitioner,

vs.

NATIONAL FARMERS ORGANIZATION, INCORPORATED,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

I.

STATEMENT OF THE CASE.

Petitioner's statement of the case is a mixture of statements purporting to be factual, which are actually only arguments made and rejected in the courts below, assumptions as facts of matters which are either completely unsupported by the record, or with respect to which the evidence was conflicting, inaccuracies, and omissions of material matters. The result is a picture so completely distorted, even to the extent that it has a factual basis in the record, that it cannot be adequately corrected by a mere statement of errors and omissions. Since petitioner's

statement of the questions presented and his asserted reasons for granting the writ are predicated upon the distorted picture so presented, a complete restatement of the case is necessary in order to present the true picture.

Nature of the Pending Action.

The merits of the pending action are, of course, not involved in the present proceeding, but it is necessary to identify the issues there involved in order to determine whether it embraces matters substantially related to a subject-matter of petitioner's former representation of respondent. That action was brought against respondent by six named individuals represented by petitioner, one of whom subsequently withdrew [R. 3][1], seeking a declaratory judgment and injunction. The complaint was in three paragraphs [R. 5-21], each of which alleged that plaintiffs were members of respondent, a not-for-profit corporation organized under the laws of the State of Iowa, holding itself out as acting under and by authority of the Capper-Volstead Act in functioning as a service corporation for its members in entering into collective bargaining agreements with processors and other buyers throughout the United States for the sale of ther farm commodities and other produce.

Respondent is alleged to have entered into contracts with various processors denominated master contracts, in the form shown by *Exhibit F* of the complaint, for the sale of such commodities. Each such contract provides that respondent (hereinafter sometimes referred to as "NFO"), is offering the same form of contract to other processors, and that none of said contracts will become effective until 30 days after respondent has advised the processors who have executed such contracts, that like contracts have been

1. Record references are to the original district court record unless otherwise stated.

signed by other processors, who have either processed, or contracted to process, at least 60% of all the particular commodity processed in the United States or in particular areas thereof during the prior three-year period. The membership agreement, a copy of which is attached to the complaint as *Exhibit E,* provides among other things that "No contract consummated with a processor shall be effective or binding until it has been ratified by a two-thirds vote of the members in the particular marketing area who have signed contracts with NFO for the commodity, attending a meeting called for that purpose by the Marketing Area Bargaining Committee, and has been approved by the Board of Directors of the NFO." Petitioner correctly states that no processor contracts have gone into effect.

Each master contract includes the following provisions:

> "15. For acting as a procurement agent for Processor and for performing further services under this contract, Processor shall pay to the N. F. O. within a ten (10) day period after each month's final settlement with N. F. O. producers, an amount equal to five per cent (5%) of the purchase price of (the commodity involved) received from N. F. O. members. One-half of one per cent (½ of 1%) paid by the processor for services rendered shall be used as determined by the N. F. O. National Board of Directors for promoting the sale of * * * (the commodity involved)."
>
> "16. Disposition of the balance of funds paid for services rendered, will be determined by the special national convention of N. F. O., to be held prior to the ratification of the first N. F. O. contract."

The complaint seeks a declaratory judgment that both the master contracts and membership agreements are unlawful, and an injunction preventing respondent from either carrying out contracts already entered into, and or entering into further similar contracts. The first paragraph charges that the foregoing provision for the 5%

payments violates Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. §13c.

The second paragraph alleges that the processor and membership agreements violate the Sherman Act because respondent is precluded by the Iowa statute under which it is organized and its Articles of Incorporation, from paying dividends or distributing any part of its property to its members prior to dissolution. It asserts that such prohibition will preclude distribution to members of any part of the 5% payments to be made by the processors, and that consequently respondent does not qualify for the immunities from the antitrust laws granted by Section 6 of the Clayton Act (15 U. S. C. § 17), and Section 1 of the Capper-Volstead Act, because it is not an association operated for the mutual benefit of the members thereof, as such producers, within the meaning of Section 1 of the Capper-Volstead Act. All of respondent's processor and membership contracts are claimed to violate the Sherman Act because it does not qualify for such immunities.

The third paragraph alleges that the processor contracts, when activated, will constitute NFO and the processors an unlawful combination in violation of the Sherman Act because even if respondent is otherwise entitled to the immunities granted by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act, the contracting processors are not producers of agricultural products, and consequently are not entitled to the benefit of such immunities [R. 5-21].

At the time of filing its answer [R. 22-42], respondent filed a verified motion to disqualify petitioner from further participation in the litigation [R. 2 (65-71)], on the ground that he had been employed by respondent as its general counsel from October, 1964 to October, 1965, and in connection with such employment had advised, counseled and rendered professional services to respondent in connection

with the same master contracts and membership agreements and other related matters, which are the subject-matter of the pending action.

Petitioner filed a verified answer with various documents and affidavits attached [R. 72-91 (20-182)]. Respondent thereafter filed numerous counter-affidavits in support of its motion [R. 93 (1-183)]. Various supplemental affidavits and exhibits were subsequently filed by the petitioner [R. 94, 98-111, 140, 141].

Proceedings With Respect to the Motion

The District Court after two hearings [R. 2, 3] found petitioner, his law firm and all counsel in partnership or association with him or his said law firm disqualified from further participation of any nature as counsel for the plaintiffs in this cause and entered an order enjoining such further participation [R. 114]. The Court of Appeals granted leave to appeal [R. 128, 129] and affirmed the order,[2] stating that in its opinion the order was supported by the record herein, and the law appertaining thereto, and that the rationale of *Consolidated Theatres* v. *Warner Circuit Management Corporation*, 2 Cir. 1954, 216 F. 2d 920, *Cord* v. *Smith*, 9 Cir. 1964, 338 F. 2d 516, and *T. C. Theatre Corp.* v. *Warner Bros. Inc.*, D. C. S. D. N. Y. 1953, 113 F. Supp. 265, was dispositive of the controlling issue presented for determination, the record before the District Court having disclosed that the matters embraced within the pending suit are closely and substantially related to a subject-matter included within the petitioner's representation of National Farmers Organization, Incorporated (Pet. App. I).

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2. Respondent has no copy of the Court of Appeals record. Page references herein are to the original paging of particular matters assumed by respondent to be included therein.

Petitioner's Version of the Facts With Respect to His Former Representation of Respondent.

Petitioner's version of the facts with respect to his former employment by respondent as stated in his petition herein, stripped of nonessentials, is substantially as follows (P. 8, 9):

He was employed in August, 1964 on a case by case basis to defend respondent and its members in many injunction and damage suits growing out of meat holding actions which he states involved about 95% of his efforts. During his employment he began to suspect that there were very serious problems with respect to respondent's legal structure, and voluntarily, on his own initiative, and without any request, promise of pay, or knowledge of respondent's officials, researched and uncovered "from public documents" all matters which are the subject of the pending action. Several months later, he was attempting unsuccessfully to meet with the directors to inform them of what he had "uncovered." Finally in September, 1965, the president and executive committee "admitted" that they already knew about such problems and criticized petitioner for "uncovering" them because they said they had not employed him to do so. Petitioner submitted a bill including what he states to be "part of my research time." At first respondent's representatives objected to paying for his time and research on the ground that he had not been employed to do the work, and he agreed to deduct the charge from his bill, but the next day, before he had an opportunity to do so, he was informed that respondent's representatives had changed their minds, and the original amount was paid as billed. Thereafter on November 10, 1965, he resigned for the stated reason that he was aware that he was not going to be able to inform the directors "of the gigantic fraud that was being perpetrated upon the

entire membership; and was convinced that the officials were not going to do anything about it."

The foregoing statement is singularly devoid of record references (P. 8, 9). The record contains other versions of the petitioner with respect to the same matters (Verified answer to respondent's motion to disqualify, R. 72-92; Petition for Leave to Appeal, pp. 5-11; petitioner's letter to the Legal Ethics Committee of the Indiana State Bar Association requesting an opinion [R. 93 (161-164)].

The Facts Shown by the Record With Respect to Petitioner's Former Employment.

Respondent does not challenge the statement that petitioner's principal, and possibly sole, activities at the time of his initial employment were concerned with the defense of certain injunction suits arising out of a holding action. But not later than October 1, 1964, he became respondent's general counsel. Despite his denials in his verified answer to the motion to disqualify [R. 72-92 (2, 3)], that he was ever general counsel, the record contains numerous letters written by petitioner beginning in October, 1964 [R. 93 (40, 41, 43, 61, 73, 74, 141, 142, 143)], in which he refers to himself as general counsel for respondent without qualification or limitation of any character. These letters show that he was introduced as respondent's general counsel at its 1964 national convention and addressed the meeting in that capacity [R. 93 (61, 73)]. Parts of his speech were quoted in various newspaper articles, including the New York Times Service Report. The articles referred to him as "NFO's general counsel" or "new general counsel for NFO." [R. 93 (45, 46, 58).]

Shortly after his resignation on November 10, 1965, petitioner met with Lee D. Sinclair who had been employed as general counsel for respondent in September 1965, to

become effective October 1, 1965 [R. 93 (116, 117)], and discussed with him all of the various matters which later became the subject-matter of the pending action [R. 72-92 (17), 93 (118-138)] [P. 10]. In a subsequent letter to Mr. Sinclair, dated December 20, 1965, discussing such matters at length, petitioner said:

> "I know that in your position as *new* chief counsel for NFO, it is not only your right but your *duty* to learn as much as you can on these problems." [R. 93 (118-138)].[3]

Later, on July 6, 1966, in a letter to the Legal Ethics Committee of the Indiana State Bar Association requesting an opinion as to whether he could ethically bring the pending action, petitioner said [R. 93 (161-164)]:

> "The legal opinion that I made reference to in the letter was written on December 20, 1965, to *my successor,* as counsel for NFO. This opinion was twenty-one single-spaced pages. It encompassed several different facets of NFO's legal structure which I feel should be corrected while there is still time before the master contracts are activated. I supported my opinion with case law and state and federal statutes."

In argument to the District Court and the Court of Appeals petitioner attempted to explain the document references with respect to his status as general counsel by asserting that in each instance he meant only that he was "general counsel in charge of the injunction suits" and so referred to himself both in his petition for leave to appeal (Memorandum attached to the petition for leave to appeal, designated Exhibit F (p. 1), and in his petition for certiorari in this Court (p. 16)). Neither of the courts below was required to accept the explanation in the face of the relevant documents and various other matters hereinafter referred to bearing on petitioner's credibility.

3. All emphasis is respondent's unless otherwise stated.

While his status as general counsel has a definite bearing on the scope of his former employment, the record further shows it involved specific matters substantially related to the subject-matter of the pending action. Respondent's counter-affidavits show in substance the following:

Regardless of petitioner's activities prior to early April 1965, he was asked at that time to investigate certain legal aspects of a memorandum which the Grain Commodity Department was proposing to issue. In order to give him the necessary background, it was necessary for him to be informed as to all aspects of the program, and as a direct result, he was asked to give an opinion with respect to the legality of all of the master contracts, including meat and dairy products as well as grain. For this purpose he discussed with the heads of the various departments, variout matters pertaining to respondent's collective bargaining and marketing operations which involved matters regarded by respondent's representatives as confidential. At no time during these discussions did petitioner express to respondent's representatives any doubt as to the legality of any part of the operation or the master contracts [R. 93 (98-102, 107-108, 113)].

During May 1965, the dairy products department was negotiating with representatives of Akron Milk Producers Association with respect to entering into a master contract for milk. A question was raised as to the legality of the proposed contract and the NFO representative stated that he would arrange a meeting between its general counsel and representatives of the milk association to discuss the matter. The meeting was held at Akron, Ohio, on May 26, 1965. Petitioner was introduced as respondent's general counsel and insisted that the master contracts were entirely legal [R. 93 (103-110)]. The supporting affidavits in the record with respect to the Akron meeting include not only those of representatives of NFO, but the affidavit of

one representative of the Milk Producer's Association and a letter of another such representative [R. 93 (103, 105, 106)].. About June 5, 1965, he advised respondent that with certain modifications, the grain memorandum would be satisfactory for use [R. 93 (99, 102)].

On June 29, 1965, an opinion letter of a Michigan law firm to one of its clients advising that a proposed master contract with respondent for edible beans was illegal, was forwarded to petitioner by the Chairman of respondent's Grain Commodity Department with a letter requesting petitioner to prepare a letter "in which you set forth *the basis of your reasoning* that all of the NFO Master Contracts are legal whether the contracts pertain to meat, dairy or grain products." [R. 92 (104-110) 93 (99-101).] The record contains nothing as to how or when the opinion letter of the Michigan firm came into the possession of respondent. There was no answering letter from petitioner, but shortly thereafter, representatives of NFO learned for the first time that he was taking the position that he had changed his mind about the legality of the master contracts, and desired to meet with the Board of Directors to explain his position [R. 93 (100, 102, 108)]. At the August meeting of the Board of Directors held August 9 and 10, 1965, it was reported to the Board that Hall had had one or more recent telephone conversations with officers and department heads of NFO in which he had expressed the opinion that the membership agreements and master contracts violated the antitrust laws, and had requested a meeting with the Board. The officers and heads of departments were instructed to meet with petitioner, hear what he had to say, and report to the Board. At the same meeting the Board adopted a resolution that Lee D. Sinclair, a member of the Trial Staff of the Federal Trade Commission, be contacted with a view to his becoming the new general counsel for respondent if satisfactory arrangements could be worked out [R. 93 (114)].

On August 21, 1965, following the meeting of the directors, the president of NFO wrote petitioner a letter to which petitioner attempts to attach significance with respect to the scope of his employment with NFO [R. 93 (81-82)]. It was a reply to a letter of petitioner of August 11, 1965 [R. 93 (102)], in which petitioner stated that after his original approval of the proposed grain matter he had expressed the view by telephone that it could not legally be followed, and that he wanted to go on record against using it until he had met with the Board of Directors to explain his views. The president's letter of August 21, 1965, stated that after rceeipt of Hall's letter of approval, representatives of NFO had been in Washington and found legal complications involved in the use of the memorandum, as a result of which the program had been greatly revamped. The president also stated that he was glad that petitioner had reconsidered his earlier contrary recommendations as to the memorandum, but that he need not be concerned with the matter any further, although he could proceed on the remaining cases arising from the holding action as he had been doing. The letter was written after the Board had initiated the employment of a new general counsel [R. 93 (114)]. While it definitely limits Hall's subsequent activities, it affords no basis for the inference he seeks to draw that it is an admission that his prior employment had been limited to the defense of such actions.

Hall's meeting with the Executive Committee of NFO, which had been authorized as aforesaid, took place on September 22, 1965, at which time Hall discussed his views as to the legality of the membership agreements and master contracts, various other matters relating to what he claimed to be legal defects in respondent's structure, and presented a bill for services, including his research with respect to such matters. His answer to the motion to disqualify states

that respondent objected to paying for these services and that *he deducted an agreed amount from his statement,* which was attached to his answer as Exhibit N, and *submitted the rest of the statement for payment* [R. 72-92 (11, 111)]. Respondent's counter-affidavits denied that the amount of the bill as submitted had ever been objected to and stated that it was paid in full. This was supported by documentary evidence [R. 93 (1-3, 96-97)]. In his Petition For Leave To Appeal to the Court of Appeals (p. 10), petitioner stated that the NFO representatives objected to paying his bill, but changed their minds the next day and "paid for copies of my research material before I returned to my office in Indianapolis." In his letter of July 6, 1966, to the Legal Ethics Committee of the Indiana State Bar Association he said merely "I presented NFO with a bill for these services and they were paid." [R. 93 (163).] The statement in the Petition (P. p. 9) that NFO objected to paying him an additional $1,000 submitted with other fee statements for part of his research time, that he agreed to deduct the charge, but was unable to do so because the office personnel to whom the bill had been given for processing had gone home, and that the next day the NFO representatives had changed their minds and paid the bill before he had an opportunity to make the deduction, appears for the first time in his Petition for Certiorari without any record reference (P. p. 9).

The discussion of petitioner's legal views at the meeting of September 22, 1965, was reported at the September meeting of the Board of Directors held September 27 and 28, 1965. At that time arrangements had been completed for Mr. Sinclair to become general counsel as of October 1, 1965, and the Board concluded that all questions with respect to the legality of the master contracts should be submitted to him for his consideration and opinion [R. 93 (114, 115)].

The form of bill rendered by petitioner for these services was:

> "Research * * * *Grain matter, contracts,* etc. * * *" [R. 72-92 (111)].

In his answer to the motion to disqualify petitioner stated that while employed by NFO he was asked to do some work on a proposed grain memorandum, but that it was unrelated to the master contracts, and not substantially related to the issues in the pending action [R. 72-92 (6)]. In the petition for leave to appeal to the Court of Appeals (p. 7) he stated: "The chairman of the grain commodity department asked me to check into *the tax ramifications in connection with a certain grain memorandum* which was to be distributed to local grain elevators and their members. However this was wholly unrelated to the issues in this case." In the petition in this Court, the only mention of the grain memorandum is in connection with petitioner's discussion of his "resignation letter" of November 10, 1965 (p. 17) which is hereinafter set forth.

At the time Mr. Sinclair became general counsel it was understood that petitioner would continue to handle the pending injunction suits [R. 93 (116)]. Apparently he became dissatisfied with that arrangement and on November 10, 1965, wrote what he refers to as his "resignation letter." In said letter, addressed to the president and board of directors of respondent, he said in part [R. 93 (90, 91)]:

> "Several months ago I was asked to check into *certain legal phases of a grain memorandum, along with the possible tax implications. My checking led me* into a history of N. F. O.; an examination and analysis of the statute under which N. F. O. was incorporated, its corporate papers, its membership agreement and master contracts; the federal income tax laws; and federal legislation on anti-trust laws and violations thereof.

"*After completing this assignment,* I reported to Mr. Staley and the Executive Committee that, in my opinion, the statute under which N. F. O. was incorporated was the worst in the country for N. F. O.'s purposes after it embarked upon the collective bargaining program; that N. F. O.'s Articles of Incorporation did not comply with statutory requirements; that the membership agreement and master contracts were illegal and therefore unenforceable by either side; that the master contracts violated Section 2-C of the Robinson-Patman Act; that N. F. O. would be placed on a for-profit basis for income tax purposes; and that the 5%, which members I have talked to expect a return of when the master contracts are activated, cannot be returned to them. I supported my opinions and recommendations on each of these problems with state statutes, federal laws, attorney general opinions, case laws, and other authorities in a 173 page research file, copies of which were submitted for your consideration.

"Since it is my opinion that the legal problems will strike down or seriously damage N. F. O.'s efforts after the master contracts have been activated, I feel that appropriate changes should be made now while there is still time. Each of my assertions were denied and recommendations not followed. I was instructed not to concern myself further with these problems as N. F. O. had been checked by experts in Washington and was alright legally speaking. * * *

"*Notwithstanding my record of success for N. F. O., there is a sharp disagreement between us as to N. F. O.'s legal status.* Since my advice will not be followed, there is no need for me to continue representing N. F. O., as it now stands. Even though I have fought hard and will continue doing so for our farmers in trying to solve their problems, I do not want it said that the disaster I feel is coming was caused as a result of my failure to give them proper legal guidance.

"I am returning the pending suits against N. F. O. in a separate mailing. I will withdraw my appearance from all of these pending suits on November 29, 1965.

I will be happy to make available to new counsel all information on these pending cases in my posssession upon written request."

Several months later, in his letter to the Legal Ethics Committee of the Indiana State Bar Association, dated July 6, 1966 [R. 93 (164)], petitioner made the following statement:

> "I should add that the president asked me when I was counsel for NFO to give an opinion with regard to a tax question. *In the process of answering the tax question* and *having concern for the matters involved, I did come up with the problems that I found to exist*, and what I thought should be done to make the changes while there was yet time. I presented NFO with a bill for these services and they (sic) were paid. I submitted approximately 167 pages of rough research with these viewpoints, notes and cases to the officers of NFO."

NFO's president, by a letter dated November 19, 1965 [R. 72-92 (100), R. 93 (92)], replied to petitioner's "resignation letter." Petitioner apparently attaches significance with respect to the scope of his prior employment to the statements in the reply that "We accept your termination of services as an *attorney* for NFO", and "I sincerely regret that you have found it necessary to terminate your employment because I do feel that you could still be of value to the organization in some matters on which you have had experience." But admittedly there was a new general counsel at the time, and the only matters petitioner was then handling were the injunctions suits.

Petitioner also states (pp. 9, 10) that he made a subsequent attempt to reach the Board of Directors by a letter dated November 22, 1965 [R. 93 (93)], in which he offered to present his views and legal authorities and "those who are supposed to disagree could submit his or their reasons

and legal authorities, point for point, to show where I was wrong." This was a curious request since petitioner had met only three days earlier with NFO's new general counsel to whom the questions had previously been referred, had explained his views, and given his successor a copy of his "resignation letter" and legal memorandum for further study [P. 10, R. 93 (117, 118)]. Under the circumstances respondent could scarcely be expected to be willing to hold a debate between its deposed general counsel and its new general counsel to whom it was then looking for advice. The offer was refused [R. 93 (94)], with a statement by the president that he saw no reason for any further communication or contact between petitioner and NFO, its officers, directors and members. In this connection it should be noted that petitioner, commencing on the day of his resignation letter, had initiated meetings with various individual members of respondent in an attempt to put pressure on the directors to obtain an acceptance of his views, in which he stated that he expected to be legal counsel for NFO at some time in the future *after there had been a change of management* [R. 93 (144-148)].

On May 23, 1966, more than six months after his employment by respondent had terminated, petitioner wrote a letter to respondent reporting that he had continued in a case as attorney for the plaintiff, involving the expulsion of a cooperative creamery from membership in an association because it had signed a master contract with NFO. He had previously been employed by NFO in the matter because of a threat to join it as a defendant which had never materialized [R. 93 (95)]. He said in the letter:

> "The expulsion occurred solely because Benson signed the N. F. O. master contract. It necessarily followed that the lower court would make comments, observations and rulings in connection therewith.
>
> "I have not forgotten your pointed request that there be no further communication with N. F. O. in any

respect. However, *since I was once employed to represent N. F. O.'s best interest in connection with that contract*, I consider it a *professional duty* to offer to review with N. F. O. those matters which I propose to file in the Supreme Court concerning it. While representing the best interests of my client, *I still wish to give every consideration for the best interests of N. F. O.*"

The record also contains the entire correspondence file of the Indiana State Bar Association in connection with its opinion letter [R. 93 (160-183)]. In the light of Hall's protestations that he is acting solely for the good of NFO and its membership, it is at least of interest to note that that file includes a letter to petitioner from a member of respondent, asking him to represent certain members in litigation against respondent, which was stated to be the basis of his request for the opinion. It contains the following statement [R. 93 (167)]:

"As I stated this is more or less a labor of love until we can get a going NFO organization into operation, at which time the agricultural business of the NFO Centrol Office which will be handling brillions (sic) of dollars worth of paper work will need a tremendous staff of legal advisors and *who better to head that legal staff, than those individuals who spent time, effort and money in revitalizing the organization?*"

II.

SUMMARY OF ARGUMENT.

A. FIRST ALLEGED QUESTION.

Whether petitioner's research concerning the matters involved in the pending action was voluntarily initiated by him, or was the result of a specific assignment by respondent, is immaterial since it is undenied that he counseled with and advised respondent with respect to such matters, rendered a bill for such services, and was paid therefor. There is no principle of law that a lawyer is free to accept adverse employment if his advice is not followed.

The record contains abundant evidence, including petitioner's written admissions that his employment by respondent included legal services with respect to matters substantially related to the subject-matter of the pending action and even where evidence is conflicting, when the courts below have concurred in the finding on successive examinations of the record, it will be accepted by this Court unless shown to be clearly erroneous.

B. SECOND ALLEGED QUESTION.

Applicability of the rationale of the cases cited in the opinion of the Court of Appeals does not depend upon their factual similarities to this case. That rationale is that where any substantial relationship is shown between the subject-matter of the former representation and that of a subsequent adverse representation, the latter will be prohibited without more. In applying that principle the conduct of the former attorney should not be weighed with hair-splitting nicety. There are no exceptions to the principle that the attorney should "abstain from all appearance of evil."

Petitioner's prior representation was that of attorney for respondent, not its individual members. Respondent is the legal representative in the pending action of its members other than the dissident members. As a matter of constitutional necessity the pending action would not even be a justiciable controversy if it did not involve the legal relations of persons having adverse legal interests.

This is not a case where the former attorney for a corporation is attempting to recover assets for the corporation, or to recover against officers or directors for wrongs to the corporation. Whatever the rule may be in such cases, it cannot apply here.

C. THIRD ALLEGED QUESTION.

No claim of fraud was made prior to the filing of the motion for disqualification. Prior to that time petitioner at all times referred to the matters now claimed to compel or justify an inference of fraud as legal disagreements. Even if the claimed exception exists, which respondent denies, no inference of fraud is either compelled by, or properly inferrable from, the record.

Even under circumstances where the former attorney is permitted to disclose confidential information in order to prevent crime or fraud, his obligation not to accept adverse employment in respect to matters regarding which he was previously retained continues. Termination of the obligation to keep the client's confidences for whatever reason does not terminate an attorney's obligation of *fidelity* to the client, his obligation *to his profession not to dishonor it,* or his obligation *to the administration of justice not to bring it into disrepute.* All of the foregoing obligations are violated when the attorney places his services at the disposal of his former client's adversary in respect to matters regarding which he was previously retained professionally, even where his obligation not to disclose his client's confidences may have terminated.

III.

ARGUMENT.

A. FIRST ALLEGED QUESTION.

The first question petitioner claims to be presented for review is stated in the petition to be

> "Whether the matters embraced within the pending suit are closely and substantially related to the subject-matter included within an area of my previous representation of NFO."

Petitioner's contention that the subject-matter of the pending action is unrelated to his prior employment is unique in one respect. There is nothing unusual in a contention by an attorney who formerly represented a party against whom he subsequently attempts to proceed, as the representative of an adverse party, that the matters involved in the former employment were not substantially related to the subject-matter of the new proceeding. That claim appears to have been made in almost every case where the question of disqualification has arisen. In this case, however, it is undisputed that during the period of his former employment petitioner engaged in legal activities with respect to respondent's matters which were not only directly and substantially related to the subject-matter of the pending action, but were in fact the identical matters, and that he not only counseled and advised respondent with respect to such matters, but submitted a bill for his services which was paid. His basic contention seems to be that such activities were not services rendered as an attorney for respondent because the work was done on his own initiative without any request from respondent, and his advice, although paid for, was not followed. Consequently,

he insists that no relation of attorney and client ever existed with respect to such services.

Even on his version of the facts such a conclusion is untenable. Neither the question of whether the work was done on his initiative, or whether his advice was followed, or a combination of the two, can constitute a proper test of whether petitioner was acting as an attorney for the client, in giving the opinion and advice. One of the principal policy reasons for protecting the confidential relation of attorney and client is to encourage complete freedom of discussion of the client's problems. It was once said by former Chief Justice Taft:

> "It is essential for the proper presentation of the client's cause that he should be able to talk freely to his counsel without fear of disclosure." (Drinker, Legal Ethics, p. 135, quoting from W. H. Taft, Ethics in Service (1915).)

There is no principle of law that compels a client to agree to or accept his attorney's advice, and any recognition of a principle that a lawyer is free to accept adverse employment with reference to a particular matter if his legal advice is not followed, would not only put improper pressure upon the client to follow the advice even though it disagreed with it, but would tend to impair the policy of encouraging free discussion. Nor can the question of who initiated the legal and factual research upon which the subsequent dicussion and advice is based be of consequence, especially where the lawyer is at the time general counsel for the client (Cf. *Chugach Electric Assn.* v. *U. S. D. C. Alaska,* 9 Cir. 1966, 370 F. 2d 441, rev. denied Oct. 9, 1967, No. 132, *Roderick* v. *Chugach Electric Assn.,* U. S. Sup.), bills it for the specific services, and is paid therefor. The question of whether petitioner could be heard to make such a contention even on his own version of the facts, is, however, purely academic in this case because as shown by

respondent's "Statement of the Case" supported by record references, there is abundant evidence in the record sustaining the successive findings of the District Court and the Court of Appeals that petitioner's representation of respondent included specific matters closely and substantially related to the subject-matter of the pending action.

A Finding Concurred in by Both Courts Below Will Be Accepted by This Court Unless Shown To Be Clearly Erroneous.

In some respects the evidence was in conflict. The only conflict with respect to the matters embraced within his former employment was created by statements of petitioner himself, some of which were verified, and some of which were merely made in briefs and argument and repeated in his Petition for Certiorari as established facts. None of the affidavits of others filed by him in opposition to the motion to disqualify, purport to cover the circumstances of petitioner's legal research with respect to matters involved in the pending case. Resolution of any conflict in the evidence was in the first instance the function of the District Court, and it determined from the record before it that petitioner was disqualified. The opinion of the Court of Appeals clearly went beyond a mere determination of whether there was evidence supporting such determination. It said:

> "* * * the record before the District Court *having disclosed* that the matters embraced within the pending suit are closely and substantially related to a subject-matter included within the petitioner's previous representation of National Farmers Organization, Incorporated."

It has long been the rule of this Court that where both courts below have concurred in the finding on successive examinations of the evidence it will be accepted in this

Court unless shown to be clearly erroneous. *Road Dist.* v. *Mo. Pac. R. R. Co.* (1927), 274 US 188, 191; *Norton* v. *Larney* (1925), 266 US 511, 518. Application of that principle here renders further discussion of what petitioner asserts to be the first question presented, superfluous. What petitioner is obviously attempting to do is to have this Court weigh the evidence *de novo,* on the basis of arguments which were made in the District Court and the Court of Appeals, and rejected by both. He has presented nothing which by any stretch of the imagination amounts to a showing that the findings of the courts below were clearly erroneous. A question depending upon obtaining a *de novo* determination of the facts by this Court is scarcely the type of question which this Court considers under Rule 19 as a ground for certiorari.

Petitioner's Version of the Facts Is Refuted by His Documentary Admissions.

Even if all of respondent's other evidence were disregarded, petitioner's version of the facts is clearly and conclusively refuted by admissions in his own documents. The affidavits of respondent's representatives state that Hall's activities in connection with the questions involved with respect to the master contracts began with, and resulted from, an assignment to look into and give an opinion with respect to the legal aspects of a grain memorandum, which respondent's Grain Department was proposing to issue. While petitioner now denies this, it is clearly admitted in his "resignation letter" of November 10, 1965 (*ante* p. 13), as well as other documents for which he is responsible. That letter was written only seven weeks after the meeting at which he presented his material and views to the executive committee, and his recollection of the events preceding it should have been clear at that time. By his own unequivocal admission, his research into the matters

involved in this action commenced with his assignment to check into certain legal phases of the grain memorandum and all of such research was a part of that assignment.

"*After completing this assignment*" he "reported to Mr. Staley and the Executive Committee" with respect to all of the matters which are the subject-matter of the pending action. It is significant that he then said "I do not want it said that the disaster I feel is coming was caused as a result of my failure *to give them proper legal guidance.*" The letter is consistent with, and explanatory of, the form of his billing for his research as "*Grain matter, contracts, etc.*" In an attempt to explain his letter in a manner consistent with his present version, petitioner now says [P. 17]:

> "It is asserted my resignation letter shows it was through specific employment on the Grain memo which led me to researching the subject-matter of this suit. I will concede to an *inaccurate use of words,* but under the circumstances I was not prone to dwell in great detail on the strict order of all the many, many events in my resignation letter. There was no reason to. The very first sentence, however, actually shows the limits of my *extra* employment and other documents in the record prove this to be the case."

In *Cord* v. *Smith* (9 Cir. 1964), 338 F. 2d 516, 523, the court said:

> "The remaining question is, was he acting as Cord's attorney? In 1934 Young claimed that what he did for Cord in connection with the Los Angeles Broadcasting Company was done by him as Cord's attorney and he sued Cord on that basis. We do not think that *it lies in the mouth of a lawyer, who has made such allegations* under oath in an action against his client, to say years later, *when it suits his interest to do so, that the allegations mean something else and that he was not acting as a lawyer.*"

While petitioner was not under oath at the time he wrote the "resignation letter", and his bill for services was paid, the same considerations should be equally applicable to his attempt to say, when it suits his interest to do so, that his prior statements, even though unsworn, that he was acting as a lawyer for his former client in rendering the services, mean something else, and that he was not acting as attorney for respondent in rendering the services for which he billed and was paid. Petitioner does not even attempt to point out what he now claims to have been an inaccurate use of words in the letter.

Petitioner apparently also claims (P. 17) that because the letter states only that he was directed to look into certain phases of a grain matter, and does not say specifically that he was directed to go into the other matters, which he says the assignment led him into, his additional research should not be considered to have been rendered as an attorney for respondent because he was only employed specifically to look into the grain matter. But whether he was specifically directed to make all of the research his "assignment" led him into, is immaterial. It is the function of the attorney to determine what research is necessary to carry out an assignment by his client, and petitioner's own conception of the scope of his assignment is so clearly stated in the letter that it cannot be in doubt.

His conception of his own obligation at the time is further shown by his statement in his letter of December 20, 1965, to Sinclair [R. 93 (118)]:

> "I know that in your position *as new chief counsel* for N. F. O., it is not only your right but your *duty* to learn as much as you can on these problems."

Petitioner also insists that his own statement of the scope of his assignment should be disregarded because the Court should know judicially that if he had not commened

his research prior to the assignment with respect to the grain matters, he would have had insufficient time to complete it. But the claim that the research *preceded* the assignment which his letter states led him into it, was never made until long after the termination of his employment.

If it is a matter of any consequence further confirmation of his statement as to when and why the work was done appears in his letter to the Legal Ethics Committee of the Indiana State Bar Association dated July 6, 1966 [R. 93 (163)] which he has not attempted to explain. He said:

> "I should add that the President of NFO asked me while I was counsel for NFO to give him an opinion with regard to a tax question. (The 'resignation letter' said: 'I was asked to check into *certain legal phases* of a *grain memorandum, along with the tax implications.') In the process of answering this tax question and with concern for other matters involved,* I did come up with the problems that I found to exist and what I thought should be done to correct them while there was still time. I presented NFO with a bill for these services and they were paid. I submitted approximately 167 pages of rough research with these viewpoints, notes and cases to the officers of NFO."

The genesis of petitioner's claim of independent research unconnected with his employment appears in the correspondence file of the Legal Ethics Committee of the Indiana State Bar Association. On July 22, 1966, the Counsel for the State Bar Association wrote the Chairman of the Legal Ethics Committee stating that he had had a three-hour conference with petitioner and had been shown his entire file [R. 93 (172)]. The letter states in part.

> "While preparing *to defend the suits against the NFO* Mr. Hall discovered defects in the organizational structure and in the contracts of the NFO which he believed violate several federal laws, including antitrust laws.

> "Mr. Hall *on his own,* prepared a detailed memorandum, outlining the illegalities and suggesting ways to eliminate them. The officers of the NFO told Mr. Hall that this was none of his business, and that he should proceed with defending the holding actions. The letter of August 21, 1965, referred to above [R. 93 (81)] substantiates this. However, Mr. Hall did bill *the NFO officers* for his time in preparing the memorandum, and was paid therefor."

That version later appeared in the Committee's opinion to Hall [R. 72-92 (167-168)], but is obviously not substantiated either by the letter referred to [R. 93 (99-101), *ante* p. 11], or by any other document in the record, and is directly contrary to Hall's own statements in his prior letter requesting the opinion from the Indiana State Bar Association [R. 93 (163)], as well as in his "resignation letter" of November 10, 1965. Petitioner, himself, has insisted throughout this litigation that his research had no connection with the defense of the holding actions, and has never claimed, and does not now claim that it arose out of his preparation to defend the holding actions, as assumed in the opinion given by the Legal Ethics Committee [R. 72-92 (167)].

In *Fleischer* v. *A. A. P. Inc.* (S. D. N. Y. 1958), 163 F. Supp. 548, 553, it is said that while the former client has the burden of showing that there is a "substantial relationship" between the issues in the present case and the subject-matter of the former representation:

> "Only where it is clearly discernible that issues involved in a current case *do not relate* to matters in which the attorney formerly represented the adverse party will the attorney's present relation be treated as measuring up to the standard of legal ethics."

In the light of the foregoing, the finding of the District Court and the Court of Appeals is not only not clearly erroneous, but is the only finding which could properly have

been made on the record. There is no merit in petitioner's contention that the matters embraced within the pending suit were not closely and substantially related to the subject-matter included within an area of his previous representation of respondent.

B. SECOND ALLEGED QUESTION.

Petioner's second alleged question is in substance whether, assuming that the finding that the matters embraced within the pending suit are substantially related to the subject-matter of his previous representation of respondent was correct, the Court of Appeals was nevertheless in error in holding the rationale of *Consolidated Theatres* v. *Warner Bros. Circuit Management Corp.*, 2 Cir. 1954, 216 F. 2d 920; *Cord* v. *Smith*, 9 Cir. 1964, 338 F. 2d 516; and *T. C. Theatres Corp.* v. *Warner Bros. Pictures, Inc.*, D. C. S. D. N. Y. 1953, 113 F. Supp. 265, dispositive of the controlling issue presented for determination. Petitioner's argument on the alleged second question is twofold. First he purports to find various factual differences between those cases and the present case (P. 21-25), which he claims serve to distinguish it. Second, he urges that his employment as attorney for the plaintiffs in the pending action should not be regarded as adverse to respondent.

Applicability of the Rationale of the Cases Cited by the Court of Appeals Does Not Depend Upon Factual Similarities.

With respect to his first contention, the issue here is not whether there are factual differences or similarities between this case and the cases cited by the Court of Appeals, but whether their *rationale* is applicable to the facts in this case. Since the adoption of the Canons of Professional Ethics of The American Bar Association in 1908,

and their later amendments, the controlling legal principles applied in the federal courts with respect to subsequent representation of an interest adverse to a former client, have been based upon judicial construction of Canons 6 and 37 with respect to the principles implicit in those canons. Canon 6, one of the original canons, provides that the obligation of a lawyer to represent his client with undivided fidelity and not to divulge his secrets or confidences, forbids the subsequent acceptance of employment from others in matters affecting any interest of the client with respect to which confidence has been reposed. That Canon refers to *two distinct obligations* which forbid the acceptance of subsequent adverse employment (a) *the obligation to represent the client with undivided loyalty,* and (b) the duty not to divulge the client's secrets or confidences.

Canon 37, added by later amendment, is an elaboration of Canon 6 with respect to the second obligation. It provides that it is the duty of the lawyer to preserve the client's confidences, that the duty outlasts the employment, and that a lawyer should not accept employment which involves or may involve use of those confidences, either for his own private advantage, or the disadvantage of his client, without his knowledge and consent, even though there are other available sources of such information.

While the underlying principles go back to the common law and were recognized in the federal courts before the adoption of the canons (*In re Boone,* 83 F. 944, N. D. Cal. 1897), the modern more precise application of their necessarily general language to particular situations actually began in *T. C. Theatre Corp.* v. *Warner Bros. Pictures* (D. C. S. D. N. Y. 1953), 113 F. Supp. 265, where the following principles were laid down:

1. Where any substantial relationship is shown between the subject-matter of a former representation and that of

a subsequent adverse representation, the latter will be prohibited without more.

2. Where such a showing is made, the court will assume the receipt of confidential information without inquiry into its nature and extent because to require the client to show such matters and their possible value to the new client would itself destroy the protection of their relationship.

It has also been said that a showing of the substantial relation creates an "irrebuttable inference" that confidential information material and relevant to the subsequent case was given to the attorney under such circumstances (*Fleischer* v. *A. A. P. Inc.* (S. D. N. Y. 1958), 163 F. Supp. 548, 552) and to the same effect, that the rule prohibiting subsequent representation in a matter arising out of or closely related to the subject-matter of the former employment does not depend for its operation upon a subsidiary decision as to whether the challenged attorney would or might be using or misusing confidential information (*Cord* v. *Smith* (9 Cir. 1964), 338 F. 2d 516, 524).

The principles stated in the *T. C. Theatres Corp.* case were subsequently considered and approved by the Court of Appeals for the Second Circuit in *Consolidated Theatres, Inc.* v. *Warner Bros. Circuit Management Corp.* (2 Cir. 1954), 216 F. 2d 920. In the latter case it was said that the courts throughout the country which have incorporated the canons into their rules of court were primarily concerned for the public good which was deemed to require assurances, as specific as possible, of the confidence inherent in the client-attorney relationship, and that while it was doubtless considered desirable that the Bar should have, in convenient form, a code of professional ethics for its guidance, the Canons must be viewed not as a Bill of Rights for the Bar, but, rather, a codification of the more important limitations on legal practice broadly deemed necessary for the protection of the clients (p. 926).

It has also been recognized that the courts in such matters have a duty over and above that of counsel to see that the good name of the Bar and of the administration of the law are upheld, and that disqualification should be ordered where the circumstances are such that to permit the lawyer for the adverse party to remain in the case would inevitably lead to suspicion and distrust in the minds of his former clients, and would afford an opportunity for misunderstanding on the part of the public which would lead to a lack of confidence in the Bar.

> *W. E. Bassett Co.* v. *H. C. Cook Company* (D. Conn. 1961), 201 F. Supp. 821, 825 aff. on opinion of District Court (2 Cir. 1962), 302 F. 2d 268;
>
> *Empire Linotype School* v. *U. S.* (S. D. N. Y. 1956), 143 F. Supp. 627, 631.

In *Cord* v. *Smith* (9 Cir. 1964), 338 F. 2d 516, 524, it was urged that certain decisions of the courts of California would permit an attorney to serve an adverse interest in a subsequent proceeding even though the subject-matter of the later action was substantially related to his former employment, if no confidential communications were shown to be involved. The court said:

> "Young asserts that in dealing with Smith he was authorized by Cord to communicate with Smith, that therefore there are no confidential communications involved, and that the rule against representing conflicting interests applies only in cases where confidential communications are involved. He cites certain California cases which he says sustain his proposition. (Two of such cases, hereinafter discussed, are relied on by petitioner here.) If they do sustain it, we decline to follow them. * * * *When an attorney appears before a federal court, he is acting as an officer of that court, and it is that court which must judge his conduct.*

"In our opinion, the rule that an attorney who has represented one party in a transaction may not thereafter represent the other party in an action against his former client, arising out of or closely relating to the transaction, does not depend for its operation upon a subsidiary decision as to whether the attorney would or might be using or misusing confidential information derived from his former client. We think that the famous words of Judge Cardozo in *Meinhard* v. *Salmon,* 1928, 249 N. Y. 458, 464, 164 N. E. 545, 546, 62 A. L. R. 1, in which he was defining the duties of a trustee, *are equally applicable to an attorney-at-law in relation to his conduct in the federal courts:* 'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. * * * Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.'"

The foregoing principles constitute the rationale of the decisions held by the Court of Appeals in this case to be dispositive of the issue, once the conclusion has been reached that the matters embraced within the pending suit are closely and substantially related to a subject-matter included within the previous representation of the former client. No Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals with respect to that rationale. Its applicability in no way depends upon fine distinctions as to the particular nature of the circumstances under which the prior legal services related to the subject-matter of the pending proceeding

were rendered, or the particular type of subsequent adverse proceeding in which the issue is raised. Once the relation is found to exist, disqualification must inevitably follow:

In *U. S.* v. *Trafficante* (5 Cir. 1964), 328 F. 2d 117, 120, the court said:

> "The Preamble to the Canons of Ethics admonishes the members of the bar that their conduct should be such as to merit the approval of all good men. That conduct should not be weighed with hair-splitting nicety. We have found no exceptions to the exhortation to 'abstain from all appearance of evil.' 1 Thessalonians 5:22."

Petitioner's contention that the rationale of the cited cases does not apply because of the factual differences he purports to find is clearly without merit.

Petitioner's Representation of Plaintiffs in the Pending Action Was Adverse to Respondent.

Petitioner's contention that the rationale of the cases cited by the Court of Appeals is inapplicable because his representation of the plaintiffs in the pending action should not be considered adverse to respondent (pp. 25-27) is equally without merit. In connection with this contention, he purports to quote without any context a statement from a document that is not only not in the record, but which the petitioner states to bear the date of July 22, 1967, which was actually after the denial of his petition for rehearing (p. 25, App. II, p. 3a). The president of NFO is quoted as saying: "It's going to take the support of the members because NFO is the members." From this statement petitioner concludes that in formerly representing NFO as its attorney he was actually representing the members, and that his present employment is not adverse to his former client because he also represented the same members in

commencing the pending action. This is obviously sheer sophistry.

The petitioner represents five members (originally six) in the pending litigation. No other member has become a plaintiff, although one has withdrawn. The complaint alleges that plaintiffs and all other members of NFO similarly situated, have common questions made the subject of the action, the answers to which are equally applicable to all members [R. 5-21 (7)]. Respondent's answer alleges that while any determination of the questions plaintiffs seek to have decided, would as a matter of law affect all members, the interest of plaintiffs in seeking to have respondent's contracts adjudged invalid is not common to all other members or to any substantial proportion of respondent's membership [R. 22-42 (3)]. Plaintiffs' reply [R. 43-64 (1, 2)] alleges that "plaintiffs are without sufficient information to know whether the interests of plaintiffs are common to all other members or to any substantial proportion of defendant's members since the defendant keeps its membership secret. Defendant's total membership, however, is not wanted by the plaintiffs in this action as it is not necessary or material to the issues in this case * * * Plaintiffs only alleged that the questions made the subject of this action are common to all members in that it applies to all members."

On the face of the record therefore petitioner's claim that he is representing "the same members" in the pending action whose interests he represented while counsel for NFO is a palpable absurdity. It is undisputed that his former employment was by respondent, that he was paid by respondent, and that in that employment he represented respondent, not the individual members. Respondent is the legal representative in the pending proceeding of the members other than the dissident members, and there is no basis for the argument that the interests of the latter are

not adverse to respondent. Otherwise the pending action could not even be a justiciable controversy. As a matter of constitutional necessity a declaratory judgment action must involve the legal relations of persons having *adverse* legal interests and must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character. *Aetna Life Ins. Co.* v. *Haworth* (1937), 300 U. S. 227, 240, 241.

The applicable principle in suits of stockholders against their corporation which would present essentially the same issue, was stated by this Court in *Smith* v. *Sperling* (1957), 354 U. S. 91, 95, to be:

> "There is antagonism whenever the management is aligned against the stockholder and defends a course of conduct which he attacks."

The proceeding in which petitioner was disqualified seeks to have declared invalid respondent's contracts with processors which it has negotiated over a period of years, and to enjoin it from further efforts to bargain on behalf of its members which is the function for which it exists. If this should be accomplished, respondent would become a mere shell, and the complaint so recognizes by seeking in the third paragraph of complaint a determination as to how its assets should be disposed of in the event the plaintiffs are successful. In essence the plaintiffs seek to destroy respondent under the guise of acting for its own good.

Whether the subsequent proceeding is contrary to the best interests of the former client or for its benefit, is not a matter to be left to the determination of an attorney who is seeking to justify his representation of the adverse party in the subsequent proceeding. The respondent is entitled to make its own determination of what constitutes the best interest of the members whom it represents, and

as shown by the pleadings, it has determined that their best interest requires resistance to the claims asserted in the pending action.

Jaccuzzi v. *Jaccuzzi Brothers, Inc.* (1963), 218 Cal. App. 2d 24, 32 Cal. Rptr. 188, is cited by petitioner in support of his contention that the rationale found applicable by the Court of Appeals is inapplicable here because this action is for respondent's benefit and not adverse to its interests. That was a derivative action by minority stockholders to recover for the benefit of the corporation property and assets claimed to have been improperly transferred for an inadequate consideration. The rule stated was:

> "Where, as here, minority shareholders bring an action against the corporation *and its directors,* seeking redress for *alleged misfeasance in office, on the part of the directors,* a former attorney for the corporation is not disqualified from representing the shareholders in such action unless there is some showing that in so doing the attorney may be called upon to breach a professional confidence previously entrusted to him by his former client."

In support the court cited *Meehan* v. *Hopps* (1956), 144 Cal. App. 2d 284, 290, 301 P. 2d 10, where it was said that when a controversy arises between an *attorney's corporate client* and *one of its directors,* it would be a sorry state of affairs if he could not use on behalf of his client, information which that officer was required by reason of his position with the corporation to give to the attorney. In *Cord* v. *Smith,* 338 F. 2d 524, n. 6, the court said with respect to those cases:

> "*Jaccuzzi* v. *Jaccuzzi Bros. Inc.,* 1963, 218 Cal. App. 2d 24, 32 Cal. Rptr. 188, and *Meehan* v. *Hopps,* 1956, 144 Cal. App. 2d 284, 301 P. 2d 10, were cases in which attorneys for a corporation filed actions against officers and directors for wrongs to the corporation, and were permitted to do so. We need not decide whether we would follow them."

Nor is such a decision required here. This is neither an action to recover assets for the corporation nor an action by the corporation against officers and directors for wrongs to the corporation and the rule applicable in such actions has no application here.

There is no merit in petitioner's contention that the District Court and the Court of Appeals erred in holding the rationale of the cases cited in the Court of Appeals opinion dispositive of the controlling issue in this case, in the light of the finding of both courts that the record in this proceeding discloses that the matters embraced within the pending suit are closely and substantially related to a subject-matter included within petitioner's previous representation of respondent.

C. THIRD ALLEGED QUESTION.

Petitioner further contends that, admitting that the matters involved in the pending action are substantially related to the subject-matter of his former employment by respondent, the rationale of the cases cited by the Court of Appeals is inapplicable because "Wrongdoing, fraud, misrepresentation, proven concealment of material facts and information from the members, and other illegality appear, even on the face of the record" (p. 27). His contention is that where fraud is involved, there is an exception to the attorney client privilege, and that where no privilege exists, the principle requiring disqualification because of a substantial relation between the subject-matter of the former employment and the matters involved in the pending action, does not apply.

The Record Shows That Petitioner's Claim of Fraud Is an Afterthought Devised for the Purpose of Attempting to Evade the Rationale Requiring Disqualification.

The record shows clearly that while the petitioner has contended repeatedly since July or early August of 1965, that the master contracts are illegal for the reasons alleged in the complaint, and has further contended that, contrary to the expectation of the members, respondent's legal structure will prevent them from receiving any part of the 5% payments to be made under the processor contracts, if, contrary to his contention in the pending case, such payments are not in violation of the Robinson-Patman Act, the claim of fraud was not made until after respondent's motion to disqualify was filed. It is plain from the record, that the claim is an afterthought devised for the sole purpose of attempting to escape disqualification.

No charge of fraud is made in the complaint, and no such charge is conceivably material to any of the asserted claims of illegality of the master contracts. The specific claim of fraud first asserted in the District Court after the disqualification motion was filed, and subsequently in the Court of Appeals, was that the members of NFO have been led by respondent's officers, agents, and employees to believe that the balance of the 5% received from the processors in payment of services, not required to be expended by respondent's board of directors in promoting the sale of the particular commodity, can be distributed to them, whereas petitioner contends that such disposition is precluded by the Iowa statute under which respondent is organized, and its own articles of incorporation. The alleged fraud is claimed to lie in respondent's failure to disclose to the members what petitioner claims to be the legal restrictions in the statute and articles of incorporation preventing such distribution [R. 72-92 (12, 13), 98-108, 43-64 (18, 19)].

Petitioner's resignation letter of November 10, 1965, stated as one of the matters which he had reported to the Executive Committee after completing his assignment "the 5% which members I have talked to expect a return of when the master contracts are activated cannot be returned to them" (*ante,* p. 14). But he also said: "Notwithstanding my record of success for NFO there is a *sharp disagreement* between us as to NFO's legal status." Obviously there is a vast difference between a legal disagreement and fraud.

In petitioner's subsequent letter to Mr. Sinclair as his successor chief counsel, he said with respect to the same matter [R. 93 (120)]:

> "Throughout my travels for N. F. O. over the country, I have talked with many, many members and organizers concerning their impression of what will be done with the 5% check-off coming to N. F. O. from the processors once master contracts are activated. In every instance they felt this 5% would be returned to them, and they would realize a 2% price advantage over non-members because of N. F. O. I feel these people are being misled because *in my opinion* this cannot be done. In support of what I have just said, I call your attention to Section 504.10 of the statute under which N. F. O. was incorporated. It reads as follows:
>
> > " 'No dividend or distribution of property among the stockholders shall be made until the dissolution of the corporation.'
>
> "Some might say this section of the statute does not apply to N. F. O. since the key word is 'stockholders' and N. F. O. has only 'members'. However, it becomes quite apparent this line of reasoning is wholly without merit when Article Nine of N. F. O.'s own Artciles of Incorporation are read. It states:
>
> > " 'No dividend or distribution of the property of this corporation shall ever be made among the

officers or members of this corporation until dissolution . . .'"

In the same letter, he said:

"I know you must first decide *if the matters I have raised have merit,* and *if so* what must be done to correct them."

In replying Mr. Sinclair stated that he had consulted with attorneys in the Federal Trade Commission and that in their view the 5% provision did not violate the Robinson-Patman Act, and he had so advised the directors. He also said in part [R. 93 (140)]:

"However there are other questions discussed by you which are just as important to consider and as to those we must address ourselves * * *

"It is only by testing these problems and studying them from all angles that we can determine *how real they are* and what the solution might be *if they are real.*"

No claim of fraud was made in Hall's letter of July 6, 1966, requesting the opinion of the Legal Ethics Committee. He said [R. 93 (164)]:

"There is a definite serious question involving a construction of the statute under which NFO was incorporated, particularly since NFO embarked upon the collective bargaining program approximately two years after it was incorporated. *If I am correct* and the NFO master contract is activated, it is entirely probable, *in my opinion,* that the millions and millions of dollars that will be flowing into NFO coffers will eventually escheat to the State of Iowa."

It was not until petitioner filed his answer to the motion to disqualify [R. 72-92 (12, 13)], that what he had previously termed a legal disagreement, became the basis for a charge of fraud. The charge was repeated in a document filed by petitioner shortly after the first hearing on the mo-

tion [R. 2], entitled "Special Pleadings As To Why Plaintiffs' Counsel Should Not Be Disqualified" [R. 98-108]. He also attempted to inject the issue into the pending action in a reply to respondent's answer to the complaint filed more than two months after the first hearing on the motion [R. 2, 43-64 (18, 19)].

No Inference of Fraud Is Either Compelled by or Properly Inferrable From the Record.

In the Petition for Certiorari (36, 37), petitioner also appears to be contending that in addition to his previous claim of fraud the Robinson-Patman question presented in the pending case has so long been settled that it is fraud even to assert a contrary position. Cases are cited which petitioner insists are so conclusive that the question cannot be considered a valid justiciable issue.

Even petitioner appears to realize the impropriety of such a claim in this proceeding. The issues in the pending action must, of course, be decided initially by the District Court. Their consideration in this proceeding is, as previously stated, limited to a determination of whether they are related to a subject-matter of petitioner's former representation of respondent. But in view of the claim of fraud with respect to the Robinson-Patman question, respondent feels that it must point out briefly the reasons it considers the authorities relied on by petitioner irrelevant.

Under the principles announced by this Court in *Sunkist* v. *Winckler & Smith Citrus Products Co.* (1962), 370 US 19, 29, respondent and its members collectively must be considered a single legal entity for purposes of the Clayton and Capper-Volstead Act. Section 2 of the Clayton Act, as amended by Section 1 of the Robinson-Patman Act, including 15 U. S. C. § 13(c), is a part of the antitrust laws of the United States. *Nashville Milk Co.* v. *Carnation Milk*

Co. (1958), 355 US 373, 376, 377. And since, for the purposes of the antitrust laws, respondent cannot be considered a legal entity separate and apart from its members, it cannot for such purposes be considered their agent, representative, or other intermediary acting on behalf of or subject to their control within the meaning of 15 U. S. C. § 13(c). It necessarily follows that the payments to be made for services are, for the purposes of the statute, payments by the processors as buyers, to the sellers, which are stated to be for services to be rendered.

All of the policy purposes of Section 13(c) involve payments of sellers to buyer or price concessions of sellers by which buyers benefit (*F. T. C.* v. *Broch & Co.* (1960), 363 US 166, 171, 174), and there has apparently been no case involving the application of Sect. 13(c) to payments by buyers. Moreover, all of the provisions of 15 U. S. C. § 13, with the single exception of (c) relate to discriminations by sellers in favor of buyers, and there is not the slightest suggestion in the *Broch* case or any other that payments or price concessions by buyers to sellers either involve or can involve any of the evils which the Act was designed to remedy. But, in any event, the controlling tests with respect to the legality of payments by buyers to sellers cannot be more stringent than those applicable to the legality of payments by sellers to buyers. With respect to the legality of the latter, regardless of earlier decisions, it must now be considered as settled by *Empire Rayon Yarn Co.* v. *American Viscose Corporation et al.* (2 Cir. 1966), 364 F. 2d 491, cert. den. 385 US 1002 (1967), that whether payments or price concessions of sellers to buyers violate 2(c) depends on the circumstances of each case and that under appropriate circumstances services rendered to a seller by a buyer may justify payments or grants of price concessions by the seller.

The final decision in the *Empire Rayon* case was made

upon a rehearing *in banc.* Originally the court by a two to one majority had decided that price concessions of the seller involved there violated the statute (354 F. 2d 182). On rehearing the dissenting opinion to the contrary (354 F. 2d 188 *et seq.*) was adopted as the majority opinion (364 F. 2d at p. 492. The final opinion shows that by reason of the importance of the question, the Federal Trade Commission was requested to and did submit a brief (364 F. 2d at p. 492). In the brief filed, the Commission said in part:

> "The crucial question in every case brought under Section 2(c) is whether the buyer is receiving preferential treatment effected through the payment of 'brokerage, or other compensation, or any allowance in lieu thereof.' The answer requires the resolution of a question of fact and must be determined under all the circumstances prevailing in each case."

The test adopted in *Empire Rayon* is one of "purpose and effect," to be determined as a fact issue in each case.

Respondent's answer in the pending action denies that the 5% payments will constitute receipt or acceptance of anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, except as compensation for services rendered to said processors by respondent and its members collectively as a single entity, and alleges that the value of the services to the processors required to be rendered under said contracts will equal or exceed the amount agreed to be paid therefor. Under the foregoing principles these allegations if made with respect to payments by a seller to a buyer, would present a fact issue as to purpose and effect. In such a determination, labels used by the parties are not controlling, *Edward Joseph Hruby* (1962), 61 F. T. C. 1437, and even though payments by buyers to sellers are within the language, but not the announced purposes of 15

U. S. C. Sect. 13(c), such payments under the foregoing principle cannot be held illegal unless they fail to satisfy the "purpose and effect" test.

Whether respondent is right or wrong is a question which the District Court must decide in the first instance. But obvlously there is no basis for petitioner's contention that no valid justiciable issue is presented with respect to the Robinson-Patman claim and that fraud is therefore inferrible on the face of the record.

Petitioner's contention that the record on its face establishes fraud of respondent with respect to the disposition of the balance of the 5% to be paid by the processors, after deduction of the portion to be used by NFO to promote the sale of the particular commodity involved, is equally untenable. His contention since the filing of the motion to disqualify has been that his legal position as to the effect of the Iowa statute and respondent's articles of incorporation is so obviously correct that there can be no basis for a good-faith contention to the contrary. But regardless of the extent to which they restrict the payment of dividends and distributions of the corporate property, they apply only to moneys and property of the corporation.

The payments in question are to be made under contracts with the processors which specifically provide the manner in which they are to be disposed of.. Under the contract provisions the disposition of such funds other than the portion to be expended to promote the sale of the commodity is to be determined not by the NFO management, but by a special national convention of its members to be held prior to the ratification of the first NFO contract. Any uses of such funds for NFO purposes or for any purposes, other than in accordance with the disposition determined by the members at the special national convention would be in violation of the contract. On the other hand there is no restriction in the contract as to the character of disposi-

tion which can be made by the members. There is no principle of law which would prohibit the payment of such funds to NFO under a contract limiting their use to a special purpose. While the analogy is not perfect a deposit of funds in a bank for an agreed special purpose is somewhat analogous. The general rule applicable to such a situation is that a delivery of money or property to a bank for application to a special purpose, while not strictly a "special" deposit as that term is usually employed, partakes of the nature of a special deposit in that the bank becomes an agent, bailee, or trustee and does not take title to the funds (9 C. J. S. p. 570). The character of such a payment is a question of fact to be determined from the purpose for which it was made, the relationship between the parties to the agreement and their intention, as expressed therein, and as revealed by the facts and circumstances of the case. 9 C. J. S. p. 565. This is the rule of the Iowa courts. In *Andrew* v. *Security Trust & Savings Bank* (1942), 214 Ia. 1199, 243 NW 542, 545, where it is said with respect to a deposit for a special purpose:

> "The meaning and effect of a contract, and the rights of the parties to it, are to be determined from their intention as evidenced by what they say and do and all that they say or do at the time and by their course of business (barring, of course, rules of evidence such as the parol evidence rule and statute of frauds, none of which is involved here). The name or designation which the parties see fit to give to the transaction or to their relationship is not conclusive. 'In determining the real character of a contract, courts will always look to its purpose, rather than to the name given to it by the parties'."

See also *Hudspeth et al.* v. *Union Trust and Savings Bank* (1923), 196 Ia. 706, 195 N. W. 378.

In *Sindlinger* v. *Department of Financial Institutions* (1936), 210 Ind. 83, 84, it was said:

> "It has been many times held by this court that a bank deposit may be made subject to any legal agreement which the depositor and the bank may make concerning it, so long as it does not injuriously affect the rights of innocent third persons * * *
>
> "A literal or technical construction of an isolated or special clause should not be indulged to defeat the true meaning of a contract. The true meaning of a contract is to be ascertained from a consideration of all its provisions in order to carry out the true intention of the parties gathered from the whole instrument."

Petitioner's contention completely overlooks the contractual provision under which the payments are to be made and assumes that any distribution thereof would constitute either the payments of dividends by respondent, or the distribution of its property. But whether the payments become its property under the contract is the threshold question that would have to be decided before the applicability of the provisions of the Iowa statute or the articles of incorporation could arise. That question should be, and obviously is a question of state law which should only be decided when and if it is presented in an appropriate proceeding rather than as a pretext for evading the application of the rationale of the cases which the Court of Appeals held dispositive. Regardless of whether respondent is right or wrong in what petitioner formerly referred to as legal disagreement, there is no basis for his contention that fraud either appears on the face of the record or is inferrable. Consequently, the claimed exception to the rationale held applicable by the Court of Appeals has no factual basis in the record even if it existed.

The Duty Not to Accept Adverse Employment Goes Beyond the Duty Not to Disclose Confidential Information.

Even in a case actually involving fraud under circumstances where the former attorney would be released from the privilege, petitioner is in error in assuming that an exception to the rule requiring disqualification from subsequent adverse representation is thereby created. Canon 37 provides two exceptions with respect to the prohibition against disclosure of confidential information. The first is that if a lawyer is accused by his client he is not precluded from disclosing the truth with respect to the accusation. The second is that the announced intention of a client to commit a crime is not included within the confidences a lawyer is bound to respect, and he may properly make such *disclosures* as may be necessary to prevent the act or protect those against whom it is threatened. Drinker in his work on Legal Ethics (p. 137), states that disclosure may be made to prevent fraud as well as the commission of a crime although he says that where a fraud is merely possible, but not clear, the lawyer should simply withdraw. However, neither stated exception goes beyond relieving the lawyer from his obligation to preserve the client's confidences with respect to the particular matter, under the particular circumstances specified, and there is no implication in the canons that whenever an exception to the privilege is found to exist, a lawyer is free to accept employment adverse to the former client, which he would otherwise have been disqualified from accepting.

Petitioner contends that *Croce* v. *Superior Court*, 1937, 21 Cal. App. 2d 18, 68 P. 2d 369, states the controlling principle. That was a case where litigation arose between several parties with respect to a transaction in which all were represented by the same attorney. The court held that in such a situation no communications between the

attorney and the clients *inter sese* are privileged, and said that while no cases precisely in point had been found it would seem to follow that if the attorney was not disqualified as an adverse witness he was not disqualified from serving as an adverse attorney. A few other cases have held the same way where the same situation was involved, but no case has been found where the general statement in the *Croce* case has been extended to any other situation.

On the contrary, in *Cord* v. *Smith* (9 Cir. 1964), 338 F. 2d 516, 524, where the contention was made that the rule against representing conflicting interests does not apply where no privilege with respect to confidential communications is present, the court said:

> "Young asserts that in dealing with Smith he was authorized by Cord to communicate with Smith, that therefore there are no confidential communications involved, and that the rule against representing conflicting interests applies only in cases where confidential communications are involved. He cites certain California cases which he says sustain his proposition. If they do sustain it, we decline to follow them."

In n. 6 and 7 on the same page it was said:

> "6. *Arden* v. *State Bar*, 1959, 52 Cal. 2d 310, 341 P. 2d 6; *Croce* v. *Superior Court*, 1937, 21 Cal. App. 2d 18, 68 P. 2d 369; *Petty* v. *Superior Court*, 1953, 116 Cal. App. 2d 20, 253 P. 2d 28; *Murphy* v. *Waterhouse*, 1896, 113 Cal. 467, 45 P. 896. *Murphy* does not touch the problem. *Arden*, *Croce* and *Petty* contain some language pointing in the direction that Young wants us to take. They are cases, however, in which the attorney had represented *both* parties to the former transaction. Not so here."
>
> "7. A number of California cases recognize that the obligation not to disclose confidential communications, or to use them against the client, is different from the duty not to accept subsequent adverse employment."

The rule stated in *Croce* was expressly rejected in *Packer* v. *Rapoport et al.* (N. Y. Sup. 1949), 88 N. Y. S. 2d 118, rev. on other grounds (N. Y. Sup. App. Div. 1949), 89 N. Y. S. 2d 703, but subsequently twice affirmed unanimously without opinion (N. Y. Sup. App. Div. 1950), 101 N. Y. S. 2d 936 (N. Y. Sup. App. Div. 1951), 103 N. Y. S. 2d 127. In the latter case it was asserted that there had been no confidential communications between the attorney and the former client because of the presence of a third person, and that consequently the lawyer was not disqualified from subsequent adverse representation. The court said (p. 120):

> "The plaintiff relies on *Croce* v. *Superior Court of City and County of San Francisco*, 21 Cal. App. 2d 18, 68 P. 2d 369, at page 370, decided by the District Court of Appeal of California, where the court said:
>
> "' * * * while no cases precisely in point have been cited by either side, it would seem to follow necessarily that if under the circumstances stated an attorney is not disqualified from serving as an adverse witness, it cannot be held that under the same circumstances he is disqualified from serving as an adverse attorney.'
>
> "The holding of the said court, although not binding on this court, is persuasive. For the reasons hereinafter set out, however, we are constrained to hold otherwise. The obligation of a witness and an attorney do not coincide. To hold, therefore, that an attorney may act adversely whenever he may be compelled to testify adversely *fails to give effect to the full obligation of an attorney, which is threefold.* An attorney owes *fidelity* to his client, *he owes his profession the duty not to dishonor it and he owes the administration of justice the duty not to bring it into disrepute. Hatch* v. *Fogarty*, 40 How. Prac. 492; *Baker* v. *Humphrey*, 101 U. S. 494, 502, 25 L. Ed. 1065; *In re Boone*, C. C. 83 F. 944, 952.
>
> "An attorney may not refuse to testify unless privilege is asserted. If the privilege is present, then relevant testimony will be excluded because the search for

truth is aided by recognizing the privilege based upon the relationship of attorney and client. The end result sought by this policy is a full disclosure by the client to his attorney, free of the fear that the attorney may be required to testify against him. In that manner relevant testimony is made available which otherwise might not see the light of day and the ends of justice are vindicated. Stated differently, the privilege closes the mouth of the attorney but serves to open the mouth of the client and others in possession of relevant evidence in consequence of the advice of the attorney, made feasible by a full disclosure as between the client and his attorney. *If the duty of the attorney was coextensive with the privilege, then the removal of the seal of secrecy by the client would serve to satisfy and cancel the duty owing to the client. Hatch* v. *Fogarty, Baker* v. *Humphrey,* and *In re Boone, supra,* show, however, that an attorney owes *fidelity* to his client and *the duty to preserve the honor of his profession and to promote the true administration of justice.* The *duty of fidelity to a client is violated* when an attorney places his services at the disposal of his former client's adversary in respect of matters regarding which the attorney was retained professionally. *The duties of an attorney to preserve the honor of his profession and to promote the true administration of justice are likewise violated by conduct of that kind or character.* The waiver of the privilege on the part of the client consequent on the presence of a third person *does not constitute a waiver of the duties aforesaid.* It would appear that an express waiver of such duties would be inoperative and void and contrary to public policy. *In re Boone, supra,* 83 F. at page 957."

The rule stated in the foregoing case is the only rule consistent with the rationale of the federal court decisions and the spirit of the canons. All of the foregoing obligations are recognized in the federal court decisions previously cited (*ante* pp. 29 to 32). The rule stated in the California case that when an attorney is not disqualified as an

adverse witness, he is not disqualified from serving as an adverse attorney clearly fails, as stated in the New York case, to give effect to the full obligation of an attorney, which includes in addition to his obligation not to disclose confidential matters, his obligation of fidelity to the client, the obligation to his profession not to dishonor it, and his obligation to the administration of justice not to bring it into disrepute. Even under circumstances where the former attorney would be released from the privilege in order to prevent his former client from perpetrating a crime or fraud, it does not follow that he may become the prosecuting attorney, or even the legal representative of the adverse party in civil litigation, without violating accepted standards of legal ethics.

Petitioner insists that the Court of Appeals failed to decide his claimed exception, but it necessarily rejected it in holding the rationale of the cited cases dispositive of the disqualification issue.

CONCLUSION.

As previously stated, the Court of Appeals for the Ninth Circuit said in *Cord* v. *Smith*, 338 F. 2d 516, 524, 525, that the famous words of Judge Cardozo in *Meinhard* v. *Salmon* (1928), 249 N. Y. 458, defining the duties of a trustee, are equally applicable to an attorney-at-law in relation to his conduct in the federal courts, and quoted Judge Cardozo's statement that:

> "Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the disintegrating erosion of particular exceptions * * *. Only thus has the level of conduct for fiduciaries been left at a higher level than that trodden by the crowd."

Recognition of such an exception as that urged by petitioner whenever collateral fraud is claimed by the former

attorney, or even requiring a subsidiary decision of such an issue before a former attorney can be disqualified from subsequent representation of the adverse party, would contribute substantially to the undermining of the rationale of the federal court cases by "the disintegrating erosion of particular exceptions." The decision of the Court of Appeals that the rationale of the cited cases applies notwithstanding the claimed exception was clearly right. The petition should be denied.

Respectfully submitted,

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